

ORIGINAL

IN THE SUPREME COURT OF OHIO

Julie Volbers-Klarich, : Case No. 2009-0933
Plaintiff-Appellant, :
v. :
Middletown Management, Inc., et al., :
Defendants-Appellees. :

MERIT BRIEF OF PLAINTIFF-APPELLANT, JULIE VOLBERS-KLARICH

Kenneth J. Ignozzi, Esq. (0055431)
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, OH 45402
(937) 223-8888
(937) 824-8630 - Fax
Attorney for Plaintiff-Appellant

James F. McDaniel (0017779)
2130 Alpine Place
Cincinnati, OH 45206
(513) 684-0808
Attorney for Defendants-Appellees

FILED
NOV 04 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	2
STATEMENT OF FACTS	3
ARGUMENT	5
<u>Proposition of Law No. I: When a Company Collects Money under the Guise of a “Tax”, While Knowing No Such Tax Exists, the Injured Party May Bring a Claim Against That Company, Rather than the Governing Entity that the Company Claims Imposed the Tax</u>	5
<u>Proposition of Law No. II: When a Company Collects Money under the Guise of a “Tax”, While Knowing No Such Tax Exists, the Injured Party Has a Claim Based on the Ohio Consumer Sales Practices Act.</u>	11
<u>Proposition of Law No. III: An Injured Party May Bring a Fraud Claim Against a Company That Took Funds from the Party by Claiming a “Tax” Was Imposed When it Knew That No Such Tax Existed</u>	13
CONCLUSION	17
CERTIFICATE OF SERVICE	18
APPENDIX	Appendix Page
Notice of Appeal of Appellant Julie Volbers-Klarich (May 21, 2009)	1
Final Entry of the Butler County Court of Appeals	3
Opinion of the Butler County Court of Appeals.....	4
Final and Appealable Decision and Entry Granting Defendant’s Motion to Dismiss Plaintiff’s Amended Complaint	15
Ohio Administrative Code §5703-9-07.....	22

O.R.C. 5739.01.....	24
O.R.C. 5739.02	50
O.R.C. 5739.08	62

TABLE OF AUTHORITIES

Page

Federal Cases:

Bergmoser v. Smart Document Solution (N.D. Ohio Feb. 22, 2007), U.S. Dist. Court
No. 1:05CV2882, 2007 WL 634674 5,9,12,14

Bergmoser v. Smart Document Solutions, LLC (C.A.6 2008), 268 Fed.Appx. 392, 2008
WL 624848 5,14

Delawder v. Platinum Financial Services Corp. (S.D. Ohio 2005), 443 F.Supp.2d 94211

Watkins & Sons Pet Supplies v. Iams, Co. (S.D. Ohio 1999), 107 F.Supp.2d 883 13

Ohio Cases:

Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc. (1996), 109 Ohio
App.3d 24615

Burr v. Board of County Commissioners (1986), 23 Ohio St. 3d 6915

Columbus & Southern Ohio Electric Co. v. Porterfield (1974), 41 Ohio App.2d 191.....6

F & J Roofing Company v. McGinley & Sons, Inc. (1987), 35 Ohio App.3d 1615-16

Howell Air, Inc. v. Porterfield (1970), 22 Ohio St.2d 32 6

Mermer v. Medical Correspondence Servs. (1996), 115 Ohio App.3d 717 11

Okocha v. Fehrenbacher (1995), 101 Ohio App.3d 309 15

Parker v. Giant Eagle, Seventh Dist. No. 01 C.A. 174, 2002-Ohio-5212 5,8-10

Philips Industries, Inc. v. Limbach (1988), 37 Ohio St.3d 1006

Village of Northfield v. Northeast Ohio Harness (1983), 13 Ohio App.3d 218, 219 6

Statutes:

R.C. §1345.09 13

R.C. §5739.01 5-7

R.C. §5739.02 6, 8-9

R.C. §5739.087-9

Miscellaneous:

Ohio Administrative Code 5703-9-07 9-10, 12, 14

Rule 8 of Ohio’s Civil Rules of Procedure 15

Rule 9 of Ohio’s Civil Rules of Procedure 15

INTRODUCTION

An Ohio company should not be allowed to blatantly defraud and steal from consumers but escape liability simply because they claimed to be collecting a fictitious 'tax.' Yet, this is exactly what Middletown Management, Inc. and Middletown Innkeepers, Inc. (collectively "Defendants-Appellees") is attempting to do. Defendants-Appellees own a Hampton Inn hotel in Fairfield, Ohio. Plaintiff-Appellant, Julie Volbers-Klarich ("Volbers-Klarich"), and her family stayed at this Hampton Inn hotel in August of 2002. As part of the charge for her stay, Defendants-Appellees fraudulently charged Volbers-Klarich for non-existent excise 'taxes' and kept for themselves the money which they obtained from this deception. However, Volbers-Klarich was not the only person defrauded by Defendant-Appellant's scam. For over seven years, Defendants-Appellees deceived and defrauded unknowing travelers who stayed at their hotel by charging them with fake and nonexistent 'taxes.'

Defendants-Appellants alleged, and the Appellate Court below incorrectly held, that the statutory framework involving the collection of taxes does not provide for a direct action by Volbers-Klarich and others similarly situated against Defendants-Appellees. Instead, the Appellate Court incorrectly held that Volbers-Klarich's only recourse is to seek a refund from the governmental entity under which the Defendant-Appellees charged the non-existent excise taxes. However, this holding is incorrect according to Ohio law. Volbers-Klarich may bring a direct action against Defendant-Appellees for their fraudulent collection of non-existent taxes which they basically stole from their unsuspecting customers and converted to their own use. The Defendants-Appellees cannot hide behind the statutory framework set up for the collection of taxes in order to avoid their liability to Volbers-Klarich and others similarly situated for their

fraudulent acts and violations of the Ohio Consumer Sales Practice Act in the collection of the non-existent excise taxes. The Appellate Court's decision should, therefore, be reversed.

STATEMENT OF THE FACTS

Plaintiff-Appellant, Julie Volbers-Klarich, and her three children stayed at the Hampton Inn in Fairfield, Ohio on or about August 2002. (Supp. at 3.) This Hampton Inn in Fairfield, Ohio is owned by Middletown Innkeepers, Inc. and is managed by Middletown Management, Inc. (collectively "Defendants-Appellees"). (Supp. at 3-4). Volbers-Klarich paid Defendants-Appellees the nightly rate for her room along with, what she thought, were three lodging taxes. (Supp. at 2). Volbers-Klarich paid a State sales tax, a Butler County excise tax, and what was supposedly a Fairfield municipal excise tax. (Supp. at 3). While the Ohio sales tax was legitimate, the supposed Fairfield municipal excise tax and Butler County tax did not actually exist. (Supp. at 2-3). Defendants-Appellees collected money from Volbers-Klarich under the guise of being a required excise tax and then kept the monies from this deception. (Supp. at 3).

Unfortunately, Volbers-Klarich was just one of Defendants-Appellees many victims. Beginning in 1999, Defendants-Appellees began this scam on travelers and guests who stayed at the Hampton Inn owned and operated by them in Fairfield, Ohio. Between 1999 and September 30, 2003, the only tax on a hotel room in Fairfield was a State sales tax.(Supp. at 2). However, during this time, Defendants-Appellees also charged their hotel patrons a purported county and municipality excise 'tax.' (Supp. at 2). Once the county excise tax became effective on October 1, 2003, Defendants-Appellees continued to charge the fictitious Fairfield excise 'tax.' (Supp. at 2-3). Defendants-Appellees had complete knowledge no such 'taxes' existed for their patrons. (Supp. at 3 & 8). Yet, Defendants-Appellees charged it to their patrons, collecting the money

for themselves. (Supp. at 3). For more than seven years, Defendants-Appellees scammed and defrauded unknowing travelers who stayed at their hotel by charging them with fake and nonexistent 'taxes.'

On April 4, 2007, Volbers-Klarich filed a class-action complaint in the Trial Court on behalf of herself and all others similarly situated who had stayed at Defendants-Appellees' Hampton Inn hotel and had been improperly and fraudulently charged for non-existent taxes. Volbers-Klarich filed an Amended Complaint on August 2, 2007. On August 21, 2007, Defendants-Appellees filed a Motion to Dismiss Volbers-Klarich's Amended Complaint pursuant to Civil Rule 12(B)(6) for allegedly failing to state a claim upon which relief can be granted. Defendants-Appellees Motion to Dismiss was based on the incorrect allegation that Volbers-Klarich's claims against Defendants-Appellees for improper collection of taxes cannot be brought against Defendants-Appellees but instead must be brought against the taxing entity. Volbers-Klarich filed a response to Defendants-Appellees' Motion to Dismiss to which Defendants-Appellees filed a reply. Oral Argument was held on October 31, 2007.

On June 12, 2008, the Trial Court filed its Decision and Entry granting Defendants-Appellees' Motion to Dismiss incorrectly holding that Volbers-Klarich's improper tax collection claim cannot be properly brought against Defendants-Appellees. (Appendix at 15.) In the Trial Court's Decision, the Trial Court also incorrectly held that Volbers-Klarich's fraud claim should be dismissed due to alleged lack of particularity even though this issue was not even argued in Defendants-Appellees' Motion to Dismiss. (Id.)

Subsequently, Volbers-Klarich appealed the Trial Court's decision to the Twelfth District Court of Appeals, which affirmed the Trial Court's decision on April 6, 2009. (Appendix at 3)

Volbers-Klarich then filed its appeal with this Court. (Appendix at 1).

ARGUMENT

I. Appellant Volbers-Klarich's Proposition of Law No. 1: When a Company Collects Money under the Guise of a "Tax", While Knowing No Such Tax Exists, the Injured Party May Bring Claims Directly Against That Company Rather than the Governing Entity that the Company Claims Imposed the "Tax".

In confirming the Trial Court's Decision, the Appellate Court held that Volbers-Klarich's claims against Defendants-Appellees should be dismissed because Volbers-Klarich cannot maintain a direct action against Defendants-Appellees, but instead must bring an action against the taxing entity pursuant to R.C. 5739.01 et seq. In reaching its conclusion, the Appellate Court relied heavily on *Parker v. Giant Eagle*, Seventh Dist. No. 01 C.A. 174, 2002-Ohio-5212 and *Bergmoser v. Smart Document Solution* (N.D. Ohio Feb. 22, 2007), U.S. Dist. Court No. 1:05CV2882, 2007 WL 634674, affirmed by *Bergmoser v. Smart Document Solutions, LLC* (C.A.6 2008), 268 Fed.Appx. 392, 2008 WL 624848 . However, *Parker* and *Bergmoser* deal with different issues and the Appellate Court has misread both the relevant law and *Parker*.

In *Parker*, a grocer improperly calculated the State sales tax and then charged the wrong amount of this tax. *Parker*, supra. Rather than charging the tax on the discounted price of goods, it charged tax on the undiscounted, full price of the goods. Thus, *Parker* deals with the mistaken charging of an incorrect amount of State sales tax. Likewise, *Bergmoser* addressed the improper collection of State sales tax. While the reasoning in *Parker* and *Bergmoser* may be proper in that scenario, this reasoning, however, does not apply to the case at bar because it is regarding the purported collection of municipal and county excise taxes, not State sales taxes.

An important difference between *Parker* and *Bergmoser* and the case at bar is the taxes at issue. In *Parker*, the store overcharged the State sales tax. In the present case, the Defendants-Appellees purported to charge nonexistent county and municipal excise taxes. An “excise tax is a tax imposed on the performance of an act, the engaging in of an occupation, or the enjoyment of a privilege.” *Columbus & Southern Ohio Electric Co. v. Porterfield* (1974), 41 Ohio App.2d 191, 196-197. While excise taxes and sales taxes are similar, they are not completely equivalent. An excise tax “is sufficiently broad in meaning to include every form of taxation not a burden laid directly on persons or property.” *Village of Northfield v. Northeast Ohio Harness* (1983), 13 Ohio App.3d 218, 219. The State sales tax is a type of excise tax. *Philips Industries, Inc. v. Limbach* (1988), 37 Ohio St.3d 100, 102-103, quoting *Howell Air, Inc. v. Porterfield* (1970), 22 Ohio St.2d 32. Because an excise tax encompasses many different kinds of taxes, including the sales tax, this means that not all excise taxes are sales taxes, and the two terms cannot be used interchangeably.

This distinction between different kinds of taxes is apparent throughout the Ohio tax laws, as the law uses ‘sales tax,’ ‘use tax,’ and ‘excise tax’ differently. Ohio R.C. §5739.02 allows the State to collect a sales tax at a rate of five and one-half per cent. The relevant section reads:

For the purpose of providing revenue with which to meet the needs of the state * * *, an excise tax is hereby levied on each retail sale made in this state.
(A)(1) The tax shall be collected as provided in section 5739.025 of the Revised Code * * *. On and after July 1, 2005, the rate of the tax shall be five and one-half per cent.

R.C. §5739.01 defines a ‘sale’ to include any transaction which lodging by a hotel is or is to be furnished to transient guests. The relevant section reads:

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: * * *

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests

While the State levies a sales tax on lodging (one form of excise tax), the tax imposed by other political subdivisions on lodging is just an 'excise tax.' R.C. §5739.08 authorizes municipalities and townships to levy excise taxes. The relevant section reads:

The levy of an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests pursuant to section 5739.02 and division (B) of section 5739.01 of the Revised Code does not prevent any of the following.

(A) A municipal corporation or township from levying an excise tax for any lawful purpose not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by section 5739.02 of the Revised Code.

The State legislature uses the terms 'sales tax' and 'excise tax' differently. While the sales tax is considered an excise tax, the excise tax levied by municipal corporations and townships on lodging is not a sales tax. The legislature obviously included 'lodging' in its definition of 'sales' for the purposes of a State sales tax. Had they wanted to allow municipalities and townships to levy a sales tax on lodging, they could have said so. They, however, only wanted municipalities and townships to be able to impose excise taxes on lodging, as evidenced by the words used in the laws.

As part of the basis for its decision in *Parker*, the Court of Appeals considered how R.C. §5739.02(E) creates a duty on the part of the vendor to remit excessively collected taxes to the State. This section, however, only deals with sales taxes. It says nothing about collecting excess excise taxes and remitting them. In fact section E is specifically discussing "tax collection for

the benefit of the state.” Taxes collected pursuant to R.C. 5739.08 are not to benefit the State but municipalities, townships, and counties. Thus, R.C. 5739.02 does not apply to the ‘excise tax’ at issue here. Because R.C. 5739.02(E) created a duty to remit sales taxes to the State, the court said Ms. Parker’s exclusive remedy was to make a claim against the State of Ohio. This analysis under *Parker* again does not apply to the case at bar. While this section creates a duty for Defendants-Appellees to remit to the State the State sales tax it collects, its application to the present case stops there. This section does not create a duty for Defendants-Appellees to remit the excise tax to the county, because R.C. §5739.08, the section authorizing excise lodging taxes, is not enumerated in R.C. §5739.02, while other tax sections are. More importantly, it says nothing about remitting collected funds that are not truly taxes, such as those in this case.

In *Parker*, the court dismissed for lack of subject matter jurisdiction because it said that the claim should have been brought in the Court of Claims. This was the correct court because the incorrectly charged sales tax had gone to the State and only the State could refund it. Again, this is much different from the present case. The State is not entitled to collect county and municipality excise taxes, nor is there a duty to remit these funds to the State. Most importantly, the charges collected by Defendants-Appellees were not a miscalculation of excise taxes, but rather it was a deliberate attempt to defraud consumers by charging them more money disguised as a municipal or county excise tax.

Part of the *Parker* court’s reasoning in determining the action to recover State sales tax must be filed in Ohio’s Court of Claims was that it was the State’s treasury which would ultimately be affected if the plaintiff’s suit for monetary damages was successful. *Parker*, supra at ¶10. But, in this case, the converse is true. The Butler County and City of Fairfield treasuries

have no involvement in the moneys falsely collected by Defendants-Appellees. First of all, in this case, the Defendants-Appellees did not remit to any governmental body the moneys it collected as 'excise taxes' that was above the amount legally imposed. Second, R.C. 5937.08 and 5939.02 did not impose a duty of Defendants-Appellees to remit monies collected under a purported county or municipal tax to that county or municipality. Thus, neither the treasury department of the State nor the county or municipal treasury departments received any of the excessively collected 'excise tax' in this case. The 'excise tax' was just a ruse for extracting additional money from the Defendants-Appellees' unwitting patrons. Thus, the Butler County and City of Fairfield treasuries do not have any of the illegally collected moneys to disburse.

In fact, it would be a waste of tax payers resources for Butler County and the City of Fairfield to have to become involved in such an action. In this case, Butler County and the City of Fairfield did not receive any funds nor did they impose any such "excise tax," yet they would be forced to incur the costs of litigating an action brought by the consumers, who stayed at Defendants-Appellee's hotel. Additionally, under the Appellate Court's argument, these governing bodies would be forced to pay the consumers the monies collected by Defendants-Appellees as a fictitious 'tax,' even though it never received any of these funds. Placing such a burden on these small governing bodies and the taxpayer is illogical.

Likewise, *Parker* and *Bergmoser* relied upon Ohio Administrative Code 5703-9-07, which does not apply here. There are two reasons why this section of the Ohio Administrative Code does not apply to the case at bar. First, OAC 5703-9-07 is a section that deals with applying for a refund of sales and use taxes. As has been discussed above, the Defendants-Appellees did not overcharge a sales or use tax. Rather, it purported to be charging an excise tax.

OAC 5703-9-07 says nothing about excise taxes. Because ‘excise tax’ has been used independently of ‘sales’ and ‘use’ taxes throughout Ohio law as was discussed above, they are different concepts. Secondly, the Defendants-Appellees did not charge the wrong amount or miscalculate the amount of tax owed. It just fraudulently pretended to be collecting a ‘tax’. Defendants-Appellees could have just as easily claimed it was a cleaning charge or perhaps a cable or utility charge. This case is not really about taxes but about deception.

Finally, it cannot be emphasized enough that in this action Volbers-Klarich is not merely seeking a refund from Defendants-Appellees of the illegally collected excise ‘tax’ but have brought a direct claim for fraud and a claim pursuant to the Ohio Consumers Sales Practices Act for damage from Defendants’ deceit. In *Parker*, the plaintiff was merely bringing claims for breach of contract, negligence, and dereliction of statutory duty. *Parker*, supra. There was not an allegation of fraud or a violation of the Ohio Consumer Sales Practices Act. In *Parker*, the store charged the wrong amount of sales tax because it was improperly calculated. In the case at bar, Defendants-Appellees did not charge the wrong amount of tax. Rather, they pretended to charge what was actually a non-existent tax. This allowed Defendants-Appellees to collect more money from its patrons in a dishonest and illegal way by leveling charges against the guest couched as additional taxes, which in reality, were not owed.

The Appellate Court in its Decision incorrectly agreed with the Trial Court that Volbers-Klarich’s only remedy is to file a claim against Butler County and the City of Fairfield, the taxing entities, for a tax refund. However, for all of the reasons above, this is incorrect. The main basis for the Appellate Court’s Decision was the *Parker* decision. But, *Parker*’s analysis does not apply here. The Defendants-Appellees did not over collect or miscalculate a tax that resulted in a

surcharge. Instead, Defendants-Appellees concocted a scheme to collect an additional charge against its customers and claimed it was a tax. The supposed tax was a county or municipal 'excise tax,' not a State sales tax, and not being a legitimate tax, no government agency was entitled to collect it nor was it paid to any governmental agency. Consequently, Butler County and the City of Fairfield is not in a position to offer a refund. All of the cases cited by the Appellate Court in its Decision are irrelevant because they do not apply to the present case. This case is a typical fraud case. Defendants-Appellees should not be permitted to escape liability for their fraud and deception merely by falsely claiming it is a 'tax'. Volbers-Klarich has alleged meritorious and valid claims upon which relief can be based and the Appellate Court therefore improperly affirmed the Trial Court's decision granting Defendants-Appellees' Motion to Dismiss.

II. Appellant Volbers- Klarich's Proposition of Law No. II: When a Company Collects Money under the Guise of a "Tax", While Knowing No Such Tax Exists, the Injured Party Has a Claim Based on the Ohio Consumer Sales Practices Act.

The Appellate Court also incorrectly held in its decision that Volbers-Klarich does not have a proper claim against Defendants-Appellees under the Ohio Consumer Sales Practices Act. In addition to her claim for improper collection of taxes, Volbers-Klarich also brought a claim against Defendants-Appellees under the Ohio Consumer Sales Practices Act ("CSPA"). The purpose of CSPA is to protect consumers from deceptive acts and practices. *Delawder v. Platinum Financial Services Corp.* (S.D. Ohio 2005), 443 F.Supp.2d 942, 953; *Mermer v. Medical Correspondence Servs.* (1996), 115 Ohio App.3d 717, 721. As Defendants-Appellees deceived consumers into paying funds for a fictitious 'tax,' Volbers-Klarich is entitled to bring a

claim pursuant to this Act. However, the Appellate Court relied upon *Bergmoser*, supra to state that a plaintiff cannot bring an action pursuant to the CSPA against the vendor.

However, *Bergmoser*, supra does not support the Appellate Court's decision. In *Bergmoser*, supra, the court prohibited the claim based on the CSPA because it stated that OAC 5703-9-07(B) provides that it is a consumer's sole remedy for a refund. Thus, the *Bergmoser* court determined that if the defendant wrongfully collected sales tax, the only remedy was to bring a claim against the State tax commissioner. Moreover, in *Bergmoser*, supra, a statute specifically allowed a fee to be charged by the vendor and thus, there was no violation of the CSPA.

However, in this case, *Bergmoser's* reasoning did not apply here. First, as is stated more fully above, OAC 5703-9-07, which contains the "sole remedy" language, upon which *Bergmoser* relied, does not apply to this case. OAC 5703-9-07 governs State sales taxes, not county or municipal excise taxes. Second, there is no statute here as in *Bergmoser* that authorized Defendants-Appellees to charge an additional fee for a night's lodging. Finally, Volbers-Klarich is not merely seeking a "refund" of the amount Defendants-Appellees charged for its fictitious tax. Rather, Defendants-Appellees maliciously deceived Volbers-Klarich and numerous other consumers into believing they had to pay additional money due to a county and/or city 'tax.' Volbers-Klarich is entitled to the damages she received as a result of this deception, which may include punitive or treble damages. This case is not merely about a "refund" of a wrongly collected tax. Therefore, *Bergmoser* does not provide authority justifying dismissing Volbers-Klarich's claims based on the CSPA.

Moreover, in order to be a consumer to bring a claim pursuant to the CSPA, one must be

an “individual.” R.C. 1345.09; *Watkins & Sons Pet Supplies v. Iams, Co.* (S.D. Ohio 1999), 107 F.Supp.2d 883. Neither a county nor a city are individuals under the CSPA and neither is therefore entitled to bring a claim under the CSPA. *Id.* It follows that neither Butler County nor the City of Fairfield is entitled to bring a claim against Defendants-Appellees under the CSPA. Only Volbers-Klarich as an individual consumer can bring a claim against Defendants-Appellees for violation of the CSPA and this claim was, therefore, improperly dismissed.

Further, the purpose of the CSPA of protecting consumers from unfair, deceptive, and unconscionable acts and practices is best served by allowing Volbers-Klarich’s CSPA claim against Defendants-Appellees to remain in this case. Defendants-Appellees’ fraudulent scheme in this case to collect additional charges from its customers under the guise of a fictional and non-existent tax in order to line its pockets is just the type of deceptive and unconscionable acts which the CSPA was designed to protect against. Therefore, because it would also further the designated purpose of the CSPA of protecting individual consumers from deceptive acts by vendors, Volbers-Klarich’s CSPA claim should not have been dismissed along with the rest of the Complaint and the Appellate Court erred in affirming the Trial Court’s Decision to dismiss these claims.

III. Appellant Volbners- Klarich’s Proposition of Law No. III: An Injured Party May Bring a Fraud Claim Against a Company that Took Money from the Party by Claiming a “Tax” Was Imposed When it Knew That No Such “Tax” Existed.

The Appellate Court also held in its Decision that Volbers-Klarich does not have a valid fraud claim against Defendants-Appellees. While the trial court determined that Volbers-Klarich’s fraud claim was not pled with sufficient particularity, the Appellate court declined to

address this issue. Rather, the Appellate court merely cited to *Bergmoser*, supra and stated that this claim was dismissed because the “remedy, for any collection of improper taxes, is filing an application for a refund from the taxing entity.” However, as is stated above *Bergmoser* is specifically relying upon an Administrative Code section, OAC 5703-9-07, that does not apply to this action in reaching this conclusion. Thus, the Appellate court was wrong to rely upon it in this case.

Moreover, when the *Bergmoser* decision was appealed to the Sixth Circuit, the Sixth Circuit, did not use the above rationale to dismiss the fraud claims as it did the CSPA claims. *Bergmoser v. Smart Document Solutions, LLC* (C.A.6 2008), 268 Fed.Appx. 392, 2008 WL 624848. On the contrary, the Sixth Circuit analyzed whether the fraud claims were pled with sufficient particularity. *Id.* at 395-396. Thus, the Sixth Circuit acknowledged that the Administrative Code’s section’s language that provided a remedy for a refund did not bar a plaintiff from bringing a claim for fraud. Therefore, the Appellate Court’s reliance upon *Bergmoser* was misplaced.

If the Appellate Court’s decision is correct, then it has prescribed a manner for deceptive companies and individuals to take advantage of Ohioans. According to the Appellate Court’s decision, anyone can charge fictitious ‘taxes’ on consumers and escape liability. Instead, the tortfeasor could merely point to OAC 5703-9-07, and have any claim against them dismissed. The mere title a tortfeasor chooses to hide their fraud behind should not remove them from liability. When a party fraudulently steals money from consumers, the consumer must be permitted to bring a claim against the tortfeasor to recover damages from the fraud, regardless of how the fraud is committed. Thus, Volbers-Klarich should be permitted to bring a claim for

fraud.

In fact, Volbers-Klarick did set forth a valid fraud claim in her complaint. In order to set forth a valid fraud claim in Ohio the plaintiff must set forth the following elements: (a) a material statement or omission of a material fact; (b) which is made by the defendant with knowledge of its falsity or such utter disregard and recklessness as to the veracity of the statement; (c) with the intent of misleading the plaintiff to rely upon the fraudulent statement; (d) justifiable reliance by the plaintiff upon the fraudulent statement; and (e) resulting injury which was proximately caused by the plaintiff's reliance. *Burr v. Board of County Commissioners* (1986), 23 Ohio St. 3d 69. According to Civil Rule 9(B) the circumstances constituting the fraud must be stated with sufficient particularity to provide the defendant with notice of the claim and prepare an adequate response.

In order to determine if a fraud claim is pled with sufficient particularity, the court must determine if the allegations in the complaint are specific enough to inform the defendant of the act complained of and enable the defendant to prepare an effective response and defense. *Okocha v. Fehrenbacher* (1995), 101 Ohio App.3d 309, 320. However, even though the pleading of a fraud claim may be vague, if the defendant has notice of the matter of which plaintiff is complaining, strict application of the rule that fraud be pled with particularity serves no useful purpose. *Aluminum Line Products Co. v. Brad Smith Roofing Co., Inc.* (1996), 109 Ohio App.3d 246, 259. The rule requiring fraud to be pled with particularity must be applied in conjunction with the general rules contained in Civil Rule 8(A)(1) and 8(E)(1) that pleadings need only contain "a short and plain statement of the claim" and that all allegations should be "simple, concise, and direct." *F& J Roofing Company v. McGinley & Sons, Inc.* (1987), 35 Ohio App.3d

16, 17.

In the case at bar, Volbers-Klarich has clearly set forth her claim for fraud with sufficient particularity to survive a motion to dismiss. First, she stated that in August of 2002 she stayed at Defendants-Appellees' Hampton Inn and at that time was fraudulently charged for a non-existent county and municipal excise tax of 6.5% related to the rental of her hotel room and that Defendants-Appellees intentionally converted these fraudulently obtained funds for their own use. (Supp. at 2-3,7-8). Therefore, Volbers-Klarich has set forth a material false statement and/or omission, i.e. the non-existent excise taxes charged to Volbers-Klarich, which was made by Defendants-Appellees and charged to Volbers-Klarich with knowledge of their non-existence and falsity, with the intent to induce her to rely on the false statements. *Id.* Finally, Volbers-Klarich's has properly alleged that she relied on Defendants-Appellees' false statements and/or omissions regarding the non-existent excise taxes they charged her for when she rented the hotel room in August of 2002 and kept for their own use, and that she incurred damages as a result. (Supp. at 7-8).

Presuming all of the factual allegations in the Amended Complaint are true and viewing them in a light most favorable to Volbers-Klarich, she has undoubtedly set forth her fraud claim against Defendants-Appellees with sufficient particularity to put Defendants-Appellees on notice of the claim and to prepare an adequate response. Volbers-Klarich has set forth the specific misrepresentation made by Defendants-Appellees, when the statement was made, and that Defendants-Appellees' representatives were responsible for the fraudulent statements. This is sufficient particularity in Ohio for a fraud claim to survive a motion to dismiss. Further, simply because the Defendants-Appellees referred to their fraudulent conduct as a "Tax" should not

shield it from being liable for committing fraud. The Appellate Court therefore clearly erred when it affirmed the Trial Court's Decision dismissing the fraud claims against Defendants-Appellees.

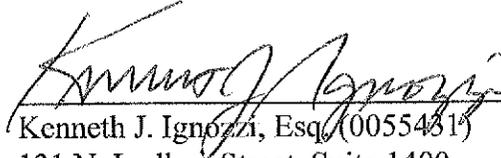
It should also be noted that Defendants-Appellees' Motion to Dismiss did not mention Volbers-Klarich's fraud claim but that the Trial Court addressed this issue sua sponte and then erroneously decided that the fraud claim should be dismissed along with the rest of the Amended Complaint. Further, the Trial Court's error in dismissing the fraud claim, and the Appellate Court's affirmation of the dismissal, is exemplified in the Trial Court's statement in its decision finding that Volber-Klarich's complaint was not pled with sufficient particularity because she did not have "documentary evidence of her stay at the Defendant[-Appellees] hotel to demonstrate the amount of taxes she was charged." (Appendix at 21). In requiring evidence of the Plaintiffs-Appellants, the Trial Court deviated from the standard of review for a motion to dismiss pursuant to Civil Rule 12(B)(6). In considering a motion to dismiss for failure to state a claim, the court must presume all of the allegations in the complaint are true. By requiring evidence of Plaintiffs-Appellants, the Trial Court failed to apply the correct standard of review and erred in dismissing Plaintiffs-Appellants complaint. The Appellate Court's affirmation of the incorrect dismissal of Plaintiff-Appellants' claims was, therefore, also in error.

CONCLUSION

For the forgoing reasons, the Appellate Court erred when it affirmed the Trial Court's Decision granting Defendants-Appellees' Motion to Dismiss Volbers-Klarich's Amended Complaint for failure to state a claim and Volbers-Klarich therefore respectfully requests that the Appellate Court's Decision be reversed.

Respectfully submitted,

DYER, GAROFALO, MANN & SCHULTZ



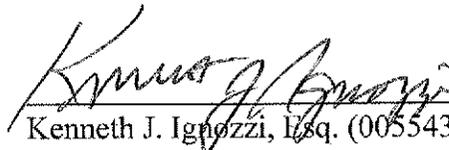
Kenneth J. Ignozzi, Esq. (0055431)
131 N. Ludlow Street, Suite 1400
Dayton, OH 45402
(937) 223-8888
(937) 824-8630 - Fax
Attorney for Plaintiff Appellant

CERTIFICATE OF SERVICE

BRIEF AND SUPPLEMENT

I hereby certify that a copy of the foregoing *was* served upon the following by regular U.S. mail, postage paid, this *4th* day of November, 2009.

James F. McDaniel
2130 Alpine Place
Cincinnati, OH 45206



Kenneth J. Ignozzi, Esq. (0055431)
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT OF OHIO

Julie Volbers-Klarich, : Case No. 2009-0933
Plaintiff-Appellant, :
v. :
Middletown Management, Inc., et al., :
Defendants-Appellees. :

APPENDIX OF PLAINTIFF-APPELLANT, JULIE VOLBERS-KLARICH

Kenneth J. Ignozzi, Esq. (0055431)
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, OH 45402
(937) 223-8888
(937) 824-8630 - Fax
Attorney for Plaintiff-Appellant

James F. McDaniel (0017779)
2130 Alpine Place
Cincinnati, OH 45206
(513) 684-0808
Attorney for Defendants-Appellees

TABLE OF CONTENTS

	Appendix Page
Notice of Appeal of Appellant Julie Volbers-Klarich (May 21, 2009)	1
Final Entry of the Butler County Court of Appeals	3
Opinion of the Butler County Court of Appeals.....	4
Final and Appealable Decision and Entry Granting Defendant’s Motion to Dismiss Plaintiff’s Amended Complaint	15
Ohio Administrative Code §5703-9-07.....	22
O.R.C. 5739.01.....	24
O.R.C. 5739.02	50
O.R.C. 5739.08	62

IN THE SUPREME COURT OF OHIO

09-0933

JULIE VOLBERS-KLARICH, :
 :
 Plaintiff/Appellants : **On Appeal from the Butler**
 : **County Court of Appeals**
 : **Twelfth District**
 v. :
 :
 Middletown Management, Inc., et al. : **Court of Appeals Case No. CA2008-07-160**
 :
 Defendants/Appellants :

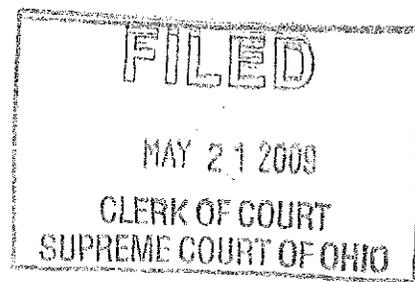
NOTICE OF APPEAL
OF APPELLANT JULIE VOLBERS-KLARICH

Kenneth J. Ignozzi, Esq. (0055431)
DYER, GAROFALO, MANN & SCHULTZ
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937)223-8888

COUNSELS FOR APPELLANT, JULIE VOLBERS-KLARICH

James F. McDaniel (0017779)
2130 Alpine Place
Cincinnati, OH 45206
(513) 684-0808

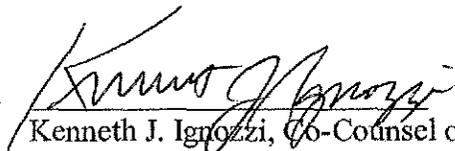
COUNSEL FOR APPELLEE, MIDDLETOWN MANAGEMENT, INC.



NOTICE OF APPEAL OF APPELLANT, JULIE VOLBERS-KLARICH

Appellant, Julie Volbers-Klarich, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Butler County Court of Appeals, Twelfth Appellate District, entered in Court of Appeals Case No. CA2008-07-160 on April 6, 2009. This case is one of public or great general interest and raises a substantial constitutional question.

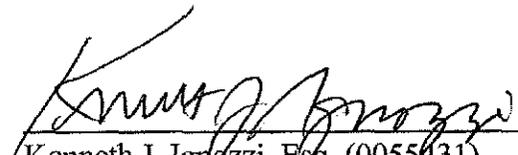
Respectfully submitted,

By: 
Kenneth J. Ignozzi, Co-Counsel of Record
Sup. Ct. No. 0055431
COUNSELS FOR APPELLANT
JULIE VOLBERS-KLARICH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by regular U.S. mail, postage paid, this 24 day of May, 2009.

James F. McDaniel
2130 Alpine Place
Cincinnati, OH 45206


Kenneth J. Ignozzi, Esq. (0055431)
Attorney for Plaintiff-Appellant

FILED
FILED BUTLER CO.
COURT OF APPEALS

APR 06 2009

CINDY CARPENTER
CLERK OF COURTS

IN THE COURT OF APPEALS

2009 APR -6 PM 1:25

TWELFTH APPELLATE DISTRICT OF OHIO

CINDY CARPENTER
BUTLER COUNTY
CLERK OF COURTS

JULIE VOLBERS-KLARICH, :

Plaintiff-Appellant, :

CASE NO. CA2008-07-160

- vs -

JUDGMENT ENTRY

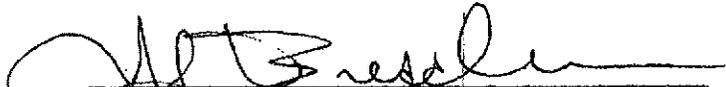
MIDDLETOWN MANAGEMENT, INC., :
et al., :

Defendants-Appellees. :

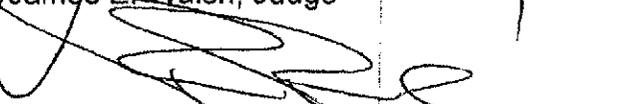
The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.


H.J. Bressler, Presiding Judge


James E. Walsh, Judge


Robert P. Ringland, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JULIE VOLBERS-KLARICH, :

Plaintiff-Appellant, :

- vs - :

MIDDLETOWN MANAGEMENT, INC., :
et al., :

Defendants-Appellees. :

CASE NO. CA2008-07-160

OPINION
4/6/2009

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-04-1344

Dyer, Garofalo, Mann & Schultz, Kenneth J. Ignozzi, 131 North Ludlow Street, Suite 1400,
Dayton, Ohio 45402, for plaintiff-appellant

James F. McDaniel, 2130 Alpine Place, Cincinnati, Ohio 45206, for defendants-appellees,
Middletown Management, Inc. and Middletown Innkeepers

BRESSLER, P.J.

{¶1} Plaintiff-appellant, Julie Volbers-Klarich, appeals the decision of the Butler County Court of Common Pleas granting the motion to dismiss pursuant to Civ.R. 12(B)(6) by defendants-appellees, Middletown Management, Inc. and Middletown Innkeepers, Inc. (hereinafter Middletown Management). We affirm the trial court's decision.

{¶2} Middletown Management owns and operates the Hampton Inn in Fairfield,

Ohio. Appellant stated that she is part of a class which includes "all other unnamed or yet unknown number of individuals and/or corporations which purchased lodging at the Hampton Inn, as a paying guest from 1999 through the date of filing th[e] complaint" who were supposedly overcharged nonexistent room taxes. Appellant's complaint alleged that she stayed at the Hampton Inn in August of 2002 where she was charged room taxes which exceeded the taxes allowable by law. In particular, appellant asserted that Middletown Management has been charging their customers excessive sales and excise taxes in the amount of 12 percent since 1999. According to appellant, the maximum amounts Middletown Management could have charged were 5.5 percent from 1999 to September 30, 2003, and 8.5 percent from October 1, 2003 to the present.¹ Appellant's complaint further claimed that Middletown Management has been converting the difference between the tax amounts they charged their guests, and the tax amounts required by law.

{¶3} Middletown Management moved to dismiss pursuant to Civ.R. 12(B)(6) arguing appellant failed to state a claim upon which relief could be granted.² Oral argument was heard on the matter, and the trial court granted the motion to dismiss. Appellant now appeals the trial court's decision by raising one assignment of error.

{¶4} "THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEE FOR FAILURE TO STATE A CLAIM UPON

1. {¶a} The maximum charges are based on appellant's contention that only the state of Ohio charged taxes on hotel stays in Fairfield, Ohio in the amount of 5.5 percent from 1999 to September 30, 2003. Pursuant to Butler County Board of Commissioners Resolutions 03-8-1314 (Aug. 11, 2003) and 03-9-1542 (Sept. 18, 2003), as of October 1, 2003, Butler County began assessing a lodging excise tax of three percent, changing the maximum amount taxable to a hotel guest to 8.5 percent.

{¶b} Although the 12 percent amounts charged were purportedly for state, county, and local taxes, Butler County only began exacting a three percent hotel excise tax on October 1, 2003 and the city of Fairfield, Ohio has only just added a transient lodging tax of three percent by passing Chapter 187 of Fairfield's Codified Ordinances on April 9, 2007.

2. Prior to filing this motion to dismiss, Middletown Management filed a Civ.R. 12(B)(1) motion claiming the trial court did not have subject matter jurisdiction. This motion was withdrawn and appellant was given an extension to file an amended complaint.

WHICH RELIEF CAN BE GRANTED PURSUANT TO CIVIL RULE 12(B)(6) BECAUSE THE IMPROPER TAX COLLECTION CLAIMS WERE PROPERLY ASSERTED AGAINST THE DEFENDANT-APPELLEE; PLAINTIFF-APPELLANT ASSERTED A PROPER CLAIM UNDER THE OHIO CONSUMER SALES PRACTICES ACT; AND PLAINTIFF-APPELLANT'S FRAUD CLAIM WAS STATED WITH SUFFICIENT PARTICULARITY."

{¶5} "A motion to dismiss for failure to state a claim upon which relief can be granted * * * tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Comms.* (1992), 65 Ohio St.3d 545, 548. "A [successful] Civ.R. 12(B)(6) motion only determines whether the pleader's allegations set forth an actionable claim." *Pyle v. Ledex, Inc.* (1990), 49 Ohio App.3d 139, 143.

{¶6} "In order for a complaint to be dismissed under Civ.R. 12(B)(6) * * *, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." *Cincinnati v. Berretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶5. "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145.

{¶7} "An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review." *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5. Thus, a reviewing court must independently review the complaint to determine whether dismissal was appropriate, and need not defer to the trial court's decision. *Chinese Merchants Assoc. v. Chin*, 159 Ohio App.3d 292, 2004-Ohio-6424, ¶4.

{¶8} Appellant argues that the trial court was incorrect in granting Middletown

Management's Civ.R. 12(B)(6) motion. Within this single assignment of error appellant raises three sub-issues. The first of these issues is her argument that she properly asserted claims against Middletown Management rather than the purported taxing agencies.

{¶9} In its decision the motion to dismiss, the trial court found that Middletown Management was not the proper party in a suit to obtain a refund for the nonexistent taxes. Instead, the trial court found that the proper parties were taxing entities, in whose names the taxes were collected. In reaching this decision, the trial court primarily relied on two cases: *Parker v. Giant Eagle, Inc.*, Mahoning App. No. 01 C.A. 174, 2002-Ohio-5212; and *Bergmoser v. Smart Document Solutions, L.L.C.* (N.D. Ohio Feb. 22, 2007), Case No. 1:05CV2882, 2007 WL 634674, affirmed (C.A.6, 2008), 268 Fed.Appx. 392.

{¶10} Appellant argues that both *Parker* and *Bergmoser* dealt with consumers requesting refunds of overcharged and wrongfully assessed "state" taxes, whereas the "taxes" collected by the Hampton Inn were excise in nature rather than sales taxes, thus making any laws and cases regarding state tax refunds inapplicable. In addition, appellant claims she is not seeking a refund of illegally collected taxes, but is instead bringing claims of fraud and a violation of R.C. Chapter 1345, otherwise known as the Ohio Consumer Sales Protection Act (OCSPA).³ Appellant also argues that the county and city are not obligated to refund the "taxes" because no county or city tax ordinance was in effect when she stayed at the Hampton Inn. Finally, appellant contends that Middletown Management should not be allowed to "escape liability," by calling the charge a "tax" on her invoice.

{¶11} We are unaware of any cases that have dealt with this particular issue directly, but we are guided, as was the trial court, by past decisions involving refund claims for taxes improperly collected or assessed.

3. This argument is essentially in appellant's second assignment of error, and as such, we will address it in that portion of the opinion.

{¶12} In *Decor Carpet Mills, Inc. v. Lindley* (1980), 64 Ohio St.2d 152, the Ohio Supreme Court determined that state sales taxes, even those wrongfully collected, are a "tax collection for the benefit of Ohio." *Id.* at 154-55. Furthermore, the *Decor* court stated that the party collecting the taxes is merely a trustee for the state. *Id.* Thus, *Decor* stands for the proposition that any taxes, even those which are overpayments, which are collected on behalf of the state belong to the state as the party collecting the taxes is merely a trustee of those funds. *Id.*

{¶13} The Second Appellate District, in *Barker Furnace Co. v. Lindley* (June 2, 1981), Montgomery App. No. 6813, 1981 WL 2815, found that where a party charges and collects a nonexistent tax under the apparent authority of state law, the party may not keep the amount collected just because collection was erroneous. *Id.* at *3. The *Barker* court noted, "so long as the collection purports to be a collection of sales tax, the vendor is responsible for payment to the State." (Emphasis added.) *Id.* The policy behind this, said the court, is that no one but the state should benefit from the collection of a tax. *Id.* Finally, the *Barker* court observed that by collecting the nonexistent taxes from its customers, the company assumed the responsibility for the collections and "the duty to remit them to the State." *Id.* at *4. Therefore, by characterizing a charge as a state tax, even if it is nonexistent, a vendor has a "duty to remit them to the State." *Id.*

{¶14} In *Parker v. Giant Eagle, Inc.*, 2002-Ohio-5212, a customer filed suit against a grocery store claiming it had overcharged her state sales tax on her groceries; however, her case was dismissed by the trial court for failure to state a claim on which relief could be granted. *Id.* at ¶1, 6. On appeal, the Seventh Appellate District held that the plaintiff should have filed her suit against the state of Ohio, in the Ohio Court of Claims, as it would ultimately be the state's treasury that would be affected if her claim was successful. *Id.* at ¶29-30. The *Parker* court stated that the grocery store was under a duty to remit the taxes to

the state, and even if the store had failed to remit them, the state still had a "right to receive th[e] funds." *Id.* at ¶29. The court pointed out that if the plaintiff was successful in her suit against the grocery store, it would in fact hinder or preclude the state's rights to the funds collected. *Id.* In essence, *Parker* suggests that a party must file against the taxing entity, rather than the vendor, as the refund should come from the state's treasury, whether or not the taxes were actually remitted to the state. *Id.* at ¶29-30.

{¶15} In *City of Findlay v. Hotels.Com, L.P.* (N.D. Ohio 2006), 441 F.Supp.2d 855, Findlay filed suit against several online travel companies based on underpayment of guest occupancy taxes to the city. *Id.* at 857-58. Relying on *Barker*, the district court found that the policy that no one should derive a benefit from sales taxes except the taxing entity was sound and applied to Findlay's claims. *Id.* at 861. The court also said "that even when a taxing statute fixes no liability, the collector is responsible for its payment to the proper taxing authority as long as the collection *purports* to be a collection of the tax." (Emphasis sic.) *Id.*, citing *Barker*, 1981 WL 2815 at *8-9. Although the city was only trying to collect underpayments of existing taxes, *Findlay* essentially applied the state tax line of cases to actions regarding local taxes.⁴

{¶16} Finally in *Bergmoser*, 2007 WL 634674, plaintiffs filed suit against Smart alleging, inter alia, fraud, and a violation of the OCSPA based on impermissibly being charged sales tax and excessive postage for copies. *Id.* at *1. The district court found that Ohio Adm.Code 5703-9-07 sets forth the procedure a consumer must use in order to obtain a refund of state sales tax. *Id.* at *2. A consumer's sole remedy, to obtain a state sales tax refund, is to file an application for refund with the tax commissioner, as it is the state's treasury that will be affected by the refund. *Id.*, citing *Parker*, 2002-Ohio-5212 at ¶29. The

4. The *Findlay* court also dismissed the city's OCSPA claim however this was because the court found Findlay lacked standing to bring the claim, and failed to plead the two prerequisites to a class action under the OCSPA in R.C. 1345.09(B). *Findlay*, 441 F.Supp.2d at 862-63.

Bergmoser court further stated the rationale in *Parker* is "that a consumer does not have a direct cause of action against a vendor who over-collected or wrongfully collected taxes." *Id.* at fn. 2. The court also noted that if a vendor failed to remit excessive taxes to the state, the state has a right to those funds. *Id.*, citing *Parker* at ¶29. As to the plaintiffs' OCSPA claims, the *Bergmoser* court dismissed them finding, "if [the] defendant wrongfully assessed and collected sales tax, plaintiffs' proper remedy is to file an application with the tax commissioner." *Id.* at *3.

{¶17} While we agree with appellant to the extent that most of the prior case law deals with state tax refunds, and the tax at issue in this case would clearly be considered an excise tax, we believe the rationale espoused by these cases is sound. Therefore, when a consumer seeks a refund of taxes, even where they are nonexistent taxes, the consumer must apply to the taxing entity for a refund. See *Parker*, 2002-Ohio-5212 at ¶29-30; *Bergmoser*, 2007 WL 634674 at *2-3.

{¶18} Even though Butler County and Fairfield were not collecting excise taxes for lodging at the time of appellant's stay, and presumably have never collected them from Middletown Management, at least until they each enacted taxing legislation, they are entitled to those funds since they were collected by the Hampton Inn as trustee for Butler County and Fairfield. See *Decor*, 64 Ohio St.2d at 154-55; *City of Findlay*, 441 F.Supp.2d at 861; *Barker*, 1981 WL 2815 at *3-4. It is thus the responsibility of Butler County and Fairfield to refund those monies to the appropriate parties, as it would ultimately be the county and city's treasuries that would be affected by any refunds, even for taxes erroneously or illegally collected. See *Parker*, 2002-Ohio-5212 at ¶29-30; *Bergmoser*, 2007 WL 634674 at *2; *Barker*, 1981 WL 2815 at *3-4. Because appellant must seek any refund from Butler County

and Fairfield, Middletown Management is not a proper party to her claim for reimbursement.⁵

{¶19} While appellant argues Middletown Management will "escape liability" if we affirm the trial court's dismissal, we can only point out that any excise taxes collected by the Hampton Inn were collected for the benefit of Butler County and Fairfield and belong wholly and solely to them. Therefore, Middletown Management cannot escape liability for the collection because both the county and the city can lay claim to the money that was collected in their names.

{¶20} After a careful review of the legislation for Butler County (Resolution Nos. 03-8-1314 and 03-9-1542) and Fairfield (Codified Ordinances Chapter 187), we have been unable to locate an analogous procedure to that contained within Ohio Adm.Code 5703-9-07 for the refund of state sales tax. However, this in no way means that such a procedure does not exist. While we recognize that Fairfield has a refund procedure, in Codified Ordinances 187.04, to return illegal or erroneous payments made to vendors or to transient guests where the guest has paid the city directly, they do not indicate how a transient guest obtains a refund of illegal or erroneous taxes paid directly to a vendor. Here we are guided by the *Parker* court which was faced with a similar dilemma. Prior to the amendment of R.C. 5739.07, which now allows consumers to apply to the tax commissioner for a refund, the *Parker* court found that even in the face of no applicable procedure, the consumer still had to apply to the taxing entity for a refund. *Parker*, 2002-Ohio-5212 at ¶15-29; accord *Bergmoser*, 2007 WL 634674 at *2, fn. 2.

{¶21} Based on these prior decisions, which dealt with what we believe to be substantially similar issues, we find that Middletown Management is not a proper party, in this particular suit, to reclaim the money appellant paid to the Hampton Inn for nonexistent county

5. This does not preclude Butler County or Fairfield from joining Middletown Management as a party to any suit to reclaim monies collected erroneously. *Parker* at ¶30 (finding that "[i]t would be up to the State of Ohio to determine whether [Giant] should be joined as a party to the suit.)

and city excise taxes. Therefore, the trial court correctly dismissed appellant's claim against Middletown Management.

{¶22} The second sub-issue is that appellant's claims against Middletown Management are based on the OCSPA rather than any "tax" laws. Appellant argues that the purpose of the OCSPA is to protect consumers against unfair, deceptive and unconscionable acts. As such, the OCSPA applies to her claim because collecting additional charges from consumers in the form of nonexistent taxes is a deceptive and unconscionable act which was allegedly perpetrated by Middletown Management.

{¶23} "The [O]CSPA is a remedial statute designed to compensate for traditional consumer remedies." *Burdge v. Kerasotes Showplace Theatres, L.L.C.*, Butler App. No. CA2006-02-023, 2006-Ohio-4560, ¶39. The OCSPA prohibits acts or practices by suppliers in consumer transactions which are "unfair or deceptive" and/or "unconscionable." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, citing R.C. 1345.02 and 1345.03.

{¶24} Here again, we feel compelled to follow the logic suggested by the district court in *Bergmoser* when it dismissed the plaintiffs' OCSPA claim. In particular, the court stated, "if defendant wrongfully assessed and collected sales tax, plaintiffs' proper remedy is to file an application with the tax commissioner." *Bergmoser*, 2007 WL 634674 at *3. While overcharging a customer for a product or service in a consumer transaction would in most circumstances be violative of the OCSPA, we believe that the county and city tax charge alleged by appellant to be unfair, deceptive and unconscionable falls outside the scope of the OCSPA precisely because it was invoiced as a tax.

{¶25} We also observe, as did the *Findlay* court, that appellant's complaint is also defective, as a purported class action, because she failed to plead the requirements of a class action pursuant to R.C. 1345.09(B). *Findlay*, 441 F.Supp.2d at 863. "Under R.C. 1345.09(B), a class action is permitted under the Act if the plaintiff alleges that the

substantive provisions of the Act have been violated, and (1) a specific rule or regulation has been promulgated under R.C. 1345.05 that specifically characterizes the challenged practice as unfair or deceptive, or (2) an Ohio state court has found the specific practice either unconscionable or deceptive in a decision open to public inspection." *Johnson v. Microsoft Corp.*, 155 Ohio App.3d 626, 2003-Ohio-7153, ¶21.

{¶26} Therefore, because appellant's claim falls outside the scope of the OCSPA, and because appellant failed to specifically plead a class action pursuant to the requirements of R.C. 1345.09(B), appellant's OCSPA claims were properly dismissed by the trial court.

{¶27} In her third sub-issue, appellant argues that her fraud claim was pled with sufficient particularity to survive dismissal. Appellant also argues that the trial court erred in requiring documentation of her stay as part of her fraud pleading thereby deviating from a Civ.R. 12(B)(6) standard of review.

{¶28} While Civ.R. 9(B) requires that the circumstances constituting fraud be pled with particularity, we need not determine whether appellant properly pled her claim for fraud as we have already established that appellant's proper remedy, for any collection of improper taxes, is filing an application for a refund from the taxing entity. See, e.g., *Bergmoser*, 2007 WL 634674. Thus, appellant cannot file an action in fraud against Middletown Management for the allegedly improper collection of county and city excise taxes.

{¶29} In conclusion, for the reasons stated above, the trial court properly dismissed appellant's claims against Middletown Management, because appellant's sole cause of action and remedy is to obtain a refund from the taxing entity. Appellant's assignment of error is hereby overruled.

{¶30} Judgment affirmed.

WALSH and RINGLAND, JJ., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

12

FILED

2008 JUN 12 PM 3:51

CINDY CARPENTER
CLERK OF COURTS
BUTLER COUNTY

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JULIE VOLBERS-KLARICK,	:	CASE NO: CV 2007 04 1344
Plaintiff,	:	JUDGE PATRICIA S. ONEY
vs.	:	DECISION AND ENTRY
MIDDLETOWN MANAGEMENT,	:	GRANTING DEFENDANT'S
INC., et al.,	:	MOTION TO DISMISS
Defendant.	:	PLAINTIFF'S AMENDED
	:	COMPLAINT
	:	<u>FINAL APPEALABLE ORDER</u>

On August 21, 2007, Defendants, Middletown Innkeepers, Inc. and Middletown Management, Inc. (hereinafter referred to collectively as "Defendants") filed a motion to Dismiss Plaintiff's Amended Complaint pursuant to Civ. R. 12(B)(6), arguing that the Complaint filed by Plaintiff, Julie Volbers-Klarick's (hereinafter referred to as "Plaintiff") fails to state a claim upon which relief can be granted. Plaintiff's amended complaint alleges (1) that Defendants collected an amount from Plaintiff as sales and excise tax above the amount required by statutes and/or ordinances and only submitted the required amount to the taxing entity, and (2) that Defendants fraudulently collected an amount as an excise tax which was nonexistent under state/local law.

Defendants argue that Plaintiff has improperly brought this action against the vendor. Defendants state that any claim for improperly or illegally collected taxes must be brought directly against the taxing entity. The Defendants conclude that the Amended Complaint remains subject to dismissal as Defendants were merely the collectors of the sales and excise tax and that the tax legally belongs to the taxing entity that has the authority to issue a refund.

Judge
PATRICIA S. ONEY
 Common Pleas Court
 Butler County, Ohio

On September 11, 2007, Plaintiff filed a Memorandum in Opposition and Motion to File a Second Amended Complaint. Plaintiff's Memorandum in Opposition argues that the Defendants perpetrated a fraud on the Plaintiff under the guise that it was engaged in the collection of sales and excise taxes for the hotel room rented by Plaintiff. Plaintiff further seeks to Amend the Complaint for the second time to add the taxing entities of Butler County and the City of Fairfield. Defendants filed a Reply on or about September 18, 2007 stating that Defendants had filed a Motion to Dismiss previously as to the original Complaint on the basis that the original Complaint had two defects. The Plaintiff amended her Complaint and only addressed the first defect, but not the second. Defendants argue in this Motion to Dismiss that Plaintiff has had her opportunity to amend the Complaint and adding the taxing entities would not change the position of Defendants that there is no cause of action against the Defendants for taxes improperly collected.

Civil Rule 12(B)(6) Standard

Pursuant to Civil Rule 12(B)(6), "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, (1992), 65 Ohio St.3d 545, 547. Therefore, a "court must analyze whether or not there is a set of facts which would allow [the suing party] to recover." *Masek v. Marroulis*, 11th Dist. No. 2007-T-0034, 2007-Ohio-6159. "If, after undertaking this review, there is no set of facts within the complaint which would entitle [the suing party] to relief, the moving party is entitled to judgment as a matter of law." *Id.*, citing to *Gawloski v. Miller Brewing Co.* (1994), 96 Ohio App.3d 160, 163.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

The Appropriate Party in this Matter

The Plaintiff's claims allege that Defendants improperly collected sales and excise taxes from Plaintiff and other guests. Although Plaintiff attempts to distinguish a sales tax from an excise tax and argue that the Defendants, as the vendors, are the appropriate party to sue, this Court disagrees. An excise tax is defined as "a tax imposed on a particular act, event, or occurrence, with the object of providing revenue for the general expenses of government." *Fletcher Cyclopedia of the Law of Corporations* (2007), Ch. 60 Taxation, §6898 Excise tax. A sales tax is a type of excise tax. As such, it is reasonable to examine any existing law on either sales or excise taxes in deciding this matter.

In Ohio, the legislature created law on sales taxes that expressly state that the vendor is a trustee of the taxing entity charged with collecting the taxes for that entity. Oh. Rev. Code §5739.03; see also, *ERB Lumber Co. v. L&J Hardwood Flooring, Inc.* (1997), 118 Ohio App.3d. 421, 693 N.E.2d 287. The vendor is required to remit the taxes to the taxing entity, including any taxes collected in excess of the statutory rate. 86 Ohio Jurisprudence 3d. (2008) Taxation, §361. The funds collected are, therefore, merely collected by the vendor, but owned by the taxing entity. It is the taxing entity that has the right to issue refunds or pursue under payment or under collection of taxes. In fact, the legislators created Section 5739.07 of Ohio's Tax Code which sets forth this concept by designating that the tax commissioner has the authority to issue refunds. Section 5739.07 states that:

(C) The commissioner shall refund to the consumer taxes paid illegally or erroneously to a vendor only if:

(1) The commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer; or

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

(2) The consumer has received a refund from a manufacturer or other person, other than the vendor, of the full purchase price, but not the tax, paid to the vendor in settlement of a complaint by the consumer about the property or service purchased.

Oh. Rev. Code §5739.07. The tax commissioner, as an agent of the taxing entity, has the authority and control of any funds collected by the vendors.

Recognizing that there is limited case law regarding a situation where improper taxes are collected by a vendor, the Court in *Parker v. Giant Eagle, Inc.* stated that the taxing entity is the proper party of such a suit as the treasury of the taxing entity is ultimately what will be affected by an award to the Plaintiff. *Parker v. Giant Eagle, Inc.* 7th Dist.), 2002-Ohio-5212. Later case law that discussed *Parker* indicated that the consumer must first request a refund from the vendor and then, upon refusal by the vendor, the consumer must petition the taxing entity for a refund. *Bergmoser v. Smart Document Solutions, LLC.* (February 22, 2007), U.S. Dist., N.D. Ohio, Eastern Div. No. 1:05CV2882, unreported, 2007 WL 634674. The Court in *Bergmoser* also found that the appropriate party to a suit for improperly collected taxes was the taxing entity and not the vendor. *Id.*

In addition to the case law, this Court notes that there is no indication that the legislature intended to create a private right of action by a consumer against a vendor for the improper collection of taxes. On the contrary, the applicable statutes and codes are not ambiguous as to the consumer's remedies, which are for the consumer to request a refund from the vendor and, if refused, then petition the taxing entity for the refund within four years of the payment of the illegal or improper tax. See, Ohio Admin. Code §5703-9-07(B) & (B)(2); Oh. Rev. Code §5739.07. Furthermore, it is reasonable to conclude that all taxing entities have similar schemes for their sales and excise taxes whereby a vendor is entrusted to collect the

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

taxes and is beholden to the municipalities to remit any taxes collected for the sake of the local taxing entity. For this reason, amending the complaint a second time would not change the fact that Plaintiff has no claim against the Defendants for the taxes collected which were remitted to the taxing entity. Ultimately, Plaintiff would have to pursue the taxing entity.

Civil Rule 9(B) Standard

Plaintiff alleges fraud in her Complaint based on the belief that the Defendants collected (1) a tax in excess of the statutory requirement and (2) a nonexistent tax and kept those amounts. In Ohio, the elements of fraud are:

- “(a) a representation or, where there is a duty to disclose, concealment of a fact.
- (b) which is material to the transaction at hand;
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
- (d) with the intent of misleading another into relying upon it;
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by reliance.”

Mercy Health Partners of Southwest Ohio v. Miller (Sept. 30, 2005), Hamilton County App. No. A0301165, unreported, 2005 WL 2592674, citing to *Wiley v. Good Samaritan Hospital*, 2004 Ohio App LEXIS 709, at *9, 2004 WL 315210 (Hamilton Cty Feb. 20, 2004) quoting *Burr v. Board of County Commissioners* (1986), 23 Ohio St.3d 69, 491 N.E.2d 1101, Syllabus ¶ 2.

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

In Ohio, Civ. R. 9(B) requires that "the circumstances constituting fraud or mistake shall be stated with particularity." Oh Rev. Code §9(B). Ohio Courts have interpreted Civ.R. 9(B) to require a Plaintiff to allege "(1) specific statements claimed to be false, (2) the time and place the statements were made, and (3) which Defendant made the statements." *Mercy Health Partners of Southwest Ohio v. Miller* (Sept. 30, 2005), Hamilton County App. No. A0301165, unreported, 2005 WL 2592674, citing to *Pollock v. Kanter* (1990), 68 Ohio App.3d 673, 681-82, 589 N.E.2d 443 (Cuyahoga Cty.), citing *Korodi v. Minot* (1987), 40 Ohio App.3d 1, 4, 531 N.E.2d 318 (Franklin Cty.).

Ohio courts previously determined that generalized statements of fraud are insufficient to meet the requirements of Civ. R. 9(B). One example is *Tackett Tire Sales, Inc. v. Bank One Dayton, Inc.*, where the appellate court affirmed the trial court's dismissal of the first cause of action for fraudulent misrepresentation or inducement. *Tackett Tire Sales, Inc. v. Bank One Dayton, Inc.* (June 21, 1996), Montgomery County App. No. 15595, unreported, 1996 WL 339944. The Court found that "Tackett alleges that the false representations were made "prior to the execution of the document" and "in the course of Defendant's solicitation of Plaintiff." We conclude that this is too general to satisfy the pleading requirements of Civ.R. 9(B)." *Id.* Another example comes from the Twelfth District where in the Court found that the fraud claim was improperly asserted:

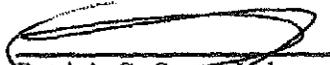
"Appellants' answer averred that "[p]laintiffs made misrepresentations that are material to the contract and as a result of misrepresentations of material facts, the contract is null and void." Because allegations of fraud must be pled with particularity, this statement in appellants' answer was insufficient to establish a fraud defense."

Stout v. Am. Group, 12th Dist. No. 2006-10-286, 2007-Ohio-4971 at ¶8.

In the matter before this Court, Plaintiff alleges fraud, but provides no facts to support that Defendants failed to remit the taxes or that Defendants kept the excess taxes collected. The allegation in the Plaintiff's Complaint is similar, in generalities, to that found by the *Stout* Court. As stated previously, vendors are obligated to remit any taxes collected and the presumption is that vendors do so in compliance with the law and to prevent being subject to penalties. At the oral hearing regarding this Motion, it was stated that no discovery has been undertaken by either party since the date of the filing of the Motion and responsive memoranda. Furthermore, Plaintiff does not even have documentary evidence of her stay at the Defendants' hotel to demonstrate the amount of taxes that she was charged regarding her stay. This lack of particularity translates to Plaintiff's failure to meet the heightened pleading requirement of Civ. R. 9(B) and thus dismissal under Civ. R. 12(B)(6) is appropriate.

Based upon the case law and the standard for dismissal under Civil Rule 12(B)(6), this Court finds that Plaintiff's claims are insufficient to provide a set of facts upon which Plaintiff may be entitled to relief against Defendants. Therefore, this Court grants Defendants' Motion to Dismiss this action Under Civil Rule 12(B)(6).

ENTER


Patricia S. Oney, Judge

cc:

James McDaniel
1234 Bartlett Building
36 E. 4th Street
Cincinnati, Ohio 45202

Kenneth Ignozzi
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

Ohio Admin. Code § 5703-9-07

C

**BALDWIN'S OHIO ADMINISTRATIVE CODE ANNOTATED
5703 TAXATION DEPARTMENT
CHAPTER 5703-9. SALES AND USE TAX**

(c) 2009 Thomson Reuters.

Rules are complete through October 11, 2009;
Appendices are current to February 8, 2009

5703-9-07 Application for refund of sales and use taxes

(A)

(1) An application for refund of sales or use tax, additional charge or penalty illegally or erroneously paid or paid on an illegal or erroneous assessment shall be made on a form provided by the department of taxation and filed with the department in accordance with instructions thereon. The application may be filed by a vendor, seller, or consumer, or by a tax representative designated on a form prescribed for such purposes, e.g. form TBOR-1, declaration of tax representative.

(2) When an application is filed by a vendor or a seller, the vendor or seller must show that the tax was remitted to the state. The vendor or seller must include the following with the application: the reasons why the payment of the tax was illegal or erroneous, and if the tax was collected from a consumer, proof that the applicant has either reimbursed the consumer for the amount of refund claimed or the consumer has agreed to await reimbursement until the final determination of the application.

(3) When an application is filed by a consumer, the consumer must show that it paid the tax to the vendor or seller or directly to the state. The consumer must include the following with the application: copies of invoices or similar documents for which a tax refund is being sought, proof of payment of the tax either to the vendor or seller or directly to the state, and the reasons why the payment of the tax was illegal or erroneous. The tax commissioner may require the consumer that paid the tax to a vendor or seller to submit an affidavit from the vendor or seller that states that the vendor or seller has not claimed refund of the tax.

(4) An application for refund of sales or use tax must be filed no later than four years after the date of the illegal or erroneous payment of the tax. Tax is paid on the date it is remitted to the state and not on the date it is collected by a vendor or seller from a consumer.

(B)

(1) A consumer seeking refund of over-collected sales or use tax must either:

(a) File an application for refund directly with the tax commissioner pursuant to paragraph (A)(3) of this rule; or

(b) Request a refund from the vendor or seller that collected the tax in question. A request for refund from a vendor or a seller is not an application for refund to the commissioner.

(2) If a vendor or seller denies a consumer's refund request, the consumer may file an application for refund with the

Ohio Admin. Code § 5703-9-07

tax commissioner pursuant to paragraph (A)(3) of this rule. That is the consumer's sole remedy to claim refund of the tax. Any such application must be filed with the commissioner within the time prescribed in paragraph (A)(4) of this rule.

(C) Any amount that is determined to be due a taxpayer on account of an application for refund of sales or use tax or request for reimbursement of the additional charge shall first be applied to any outstanding indebtedness of that taxpayer pursuant to section 5739.072 of the Revised Code. Any amount remaining after the satisfaction of such outstanding indebtedness shall be paid to the taxpayer.

HISTORY: 2004-05 OMR pam. #6 (A), eff. 12-16-04; 2002-03 OMR 1047 (R-E), eff. 10-18-02; 1981-82 OMR 452 (A), eff. 1-8-82; Prior TX-11-07

RC 119.032 rule review date(s): Exempt; 10-18-07

<General Materials (GM) - References, Annotations, or Tables>
CROSS REFERENCES

{C 5703.05, Powers, duties, and functions of tax commissioner

{C 5703.14, Rules of board of tax appeals and tax commissioner;
procedures; part of Ohio administrative code

{C 5739.07, Refund by tax commissioner

{C 5739.072, Application of refund to satisfaction of other tax indebtedness

{C 5739.12, Monthly, semiannual, and annual return by vendor; payments;
prompt payment discounts

{C 5739.13, Liability of vendor and consumer; assessment; petition for
reassessment; interest; penalties; appeal; judgment; execution

{C 5739.14, Sale of entire business; successor liable for taxes and
penalties due

{C 5741.10, Refund to seller or consumer

{C 5741.12, Return required by seller or user; payment of tax

{C 5741.17, Registration of sellers with tax commissioner

Refund by tax commissioner 1

C

Baldwin's Ohio Revised Code Annotated Currentness
Title LVII. Taxation
 [Ⓜ] Chapter 5739. Sales Tax (Refs & Amos)
 [Ⓜ] Definitions
 → **5739.01 Definitions**

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

(c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;

(d) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry cleaning services are or are to be provided;

(e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An "affiliated group" means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

(f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;

(g) Landscaping and lawn care service is or is to be provided;

(h) Private investigation and security service is or is to be provided;

(i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;

(j) Building maintenance and janitorial service is or is to be provided;

(k) Employment service is or is to be provided;

(l) Employment placement service is or is to be provided;

(m) Exterminating service is or is to be provided;

(n) Physical fitness facility service is or is to be provided;

(o) Recreation and sports club service is or is to be provided;

(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;

(q) On and after August 1, 2003, personal care service is or is to be provided to an individual. As used in this division, "personal care service" includes skin care, the application of cosmetics, manicuring, pedicuring, hair removal, tattooing, body piercing, tanning, massage, and other similar services. "Personal care service" does not include a service provided by or on the order of a licensed physician or licensed chiropractor, or the cutting, coloring, or styling of an individual's hair.

(r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined in section 5735.01 of the Revised Code, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under 49 U.S.C. 41102;

(s) On and after August 1, 2003, motor vehicle towing service is or is to be provided. As used in this division, "motor vehicle towing service" means the towing or conveyance of a wrecked, disabled, or illegally parked motor vehicle.

(t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal service" means the removal of snow by any mechanized means, but does not include the providing of such service by a person that has less than five thousand dollars in sales of such service during the calendar year.

(u) Electronic publishing service is or is to be provided to a consumer for use in business, except that such transactions occurring between members of an affiliated group, as defined in division (B)(3)(e) of this section, are not sales.

(4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used directly in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, if the corporation is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of such films for exhibition purposes is not a sale;

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business;

(10) All transactions in which “guaranteed auto protection” is provided whereby a person promises to pay to the consumer the difference between the amount the consumer receives from motor vehicle insurance and the amount the consumer owes to a person holding title to or a lien on the consumer’s motor vehicle in the event the consumer’s motor vehicle suffers a total loss under the terms of the motor vehicle insurance policy or is stolen and not recovered, if the protection and its price are included in the purchase or lease agreement;

(11)(a) Except as provided in division (B)(11)(b) of this section, on and after October 1, 2009, all transactions by which health care services are paid for, reimbursed, provided, delivered, arranged for, or otherwise made available by a medicaid health insuring corporation pursuant to the corporation’s contract with the state.

(b) If the centers for medicare and medicaid services of the United States department of health and human services determines that the taxation of transactions described in division (B)(11)(a) of this section constitutes an impermissible health care-related tax under section 1903(w) of the “Social Security Act,” 49 Stat. 620 (1935), 42 U.S.C. 1396b(w), as amended, and regulations adopted thereunder, the director of job and family services shall notify the tax commissioner of that determination. Beginning with the first day of the month following that notification, the transactions described in division (B)(11)(a) of this section are not sales for the purposes of this chapter or Chapter 5741. of the Revised Code. The tax commissioner shall order that the collection of taxes under sections 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022, and 5741.023 of the Revised Code shall cease for transactions occurring on or after that date.

Except as provided in this section, “sale” and “selling” do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) “Vendor” means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(D)(1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4)(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exemption under division (B)(42)(f) of section 5739.02 of the Revised Code for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale

exception under division (E)(1) of this section.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

(7) In the case of a transaction for health care services under division (B)(11) of this section, a medicaid health insuring corporation is the consumer of such services. The purchase of such services by a medicaid health insuring corporation is not subject to the exception for resale under division (E)(1) of this section or to the exemptions provided under divisions (B)(12), (18), (19), and (22) of section 5739.02 of the Revised Code.

(E) "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)(1)(a) "Price," except as provided in divisions (H)(2), (3), and (4) of this section, means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(i) The vendor's cost of the property sold;

(ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;

(iii) Charges by the vendor for any services necessary to complete the sale;

(iv) On and after August 1, 2003, delivery charges. As used in this division, "delivery charges" means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.

(v) Installation charges;

(vi) Credit for any trade-in.

(b) "Price" includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:

(i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;

(ii) The consumer identifies the consumer's self to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.

(iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.

(c) "Price" does not include any of the following:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in this division, "watercraft" includes an outdrive unit attached to the watercraft.

(4) In the case of transactions for health care services under division (B)(11) of this section, "price" means the amount of managed care premiums received each month by a medicaid health insuring corporation.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible

personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether the rooms are in one or several structures, except as otherwise provided indivision (G) of section 5739.09 of the Revised Code.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed, regardless of whether the vendor is a delivery vendor.

(P) "Used directly in the rendition of a public utility service" means that property that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. In this definition, "public utility" includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation

or physical, mechanical, or chemical processes.

(R) “Assembly” and “assembling” mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) “Manufacturing operation” means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. “Manufacturing operation” does not include packaging.

(T) “Fiscal officer” means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county that is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) “Transit authority” means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority that includes territory in more than one county must include all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(V) “Legislative authority” means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county that is a transit authority, the board of county commissioners.

(W) “Territory of the transit authority” means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) “Providing a service” means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)(1)(a) “Automatic data processing” means processing of others' data, including keypunching or similar data entry

services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

For transactions occurring on or after the effective date of the amendment of this section by H.B. 157 of the 127th general assembly, December 21, 2007, "electronic information services" does not include electronic publishing as defined in division (LLL) of this section.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA)(1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added. "Telecommunications service" does not include any of the following:

(a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a consumer where the consumer's primary purpose for the underlying transaction is the processed data or information;

(b) Installation or maintenance of wiring or equipment on a customer's premises;

(c) Tangible personal property;

(d) Advertising, including directory advertising;

(e) Billing and collection services provided to third parties;

(f) Internet access service;

(g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as defined in 47 U.S.C. 522(6),

and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 C.F.R. 20.3;

(h) Ancillary service;

(i) Digital products delivered electronically, including software, music, video, reading materials, or ring tones.

(2) "Ancillary service" means a service that is associated with or incidental to the provision of telecommunications service, including conference bridging service, detailed telecommunications billing service, directory assistance, vertical service, and voice mail service. As used in this division:

(a) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call, including providing a telephone number. "Conference bridging service" does not include telecommunications services used to reach the conference bridge.

(b) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(c) "Directory assistance" means an ancillary service of providing telephone number or address information.

(d) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and manage multiple calls and call connections, including conference bridging service.

(e) "Voice mail service" means an ancillary service that enables the customer to store, send, or receive recorded messages. "Voice mail service" does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(3) "900 service" means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service, and which is typically marketed under the name "900" service and any subsequent numbers designated by the federal communications commission. "900 service" does not include the charge for collection services provided by the seller of the telecommunications service to the subscriber, or services or products sold by the subscriber to the subscriber's

customer.

(4) "Prepaid calling service" means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units of dollars of which the number declines with use in a known amount.

(5) "Prepaid wireless calling service" means a telecommunications service that provides the right to utilize mobile telecommunications service as well as other non-telecommunications services, including the download of digital products delivered electronically, and content and ancillary services, that must be paid for in advance and that is sold in predetermined units of dollars of which the number declines with use in a known amount.

(6) "Value-added non-voice data service" means a telecommunications service in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.

(7) "Coin-operated telephone service" means a telecommunications service paid for by inserting money into a telephone accepting direct deposits of money to operate.

(8) "Customer" has the same meaning as in section 5739.034 of the Revised Code.

(BB) "Laundry and dry cleaning services" means removing soil or dirt from towels, linens, articles of clothing, or other fabric items that belong to others and supplying towels, linens, articles of clothing, or other fabric items. "Laundry and dry cleaning services" does not include the provision of self-service facilities for use by consumers to remove soil or dirt from towels, linens, articles of clothing, or other fabric items.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to

establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

(5) Transactions where the personnel so provided or supplied by a provider or supplier to a purchaser of an employment service are then provided or supplied by that purchaser to a third party as an employment service, except "employment service" does include the transaction between that purchaser and the third party.

(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or

renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food or food production, and includes but is not limited to cattle, sheep, goats, swine, and poultry. "Livestock" does not include invertebrates, fish, amphibians, reptiles, horses, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as insection 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A “competitive professional racing event” is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) “Full-time employee” means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

(UU)(1) “Lease” or “rental” means any transfer of the possession or control of tangible personal property for a fixed or indefinite term, for consideration. “Lease” or “rental” includes future options to purchase or extend, and agreements described in 26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon the sale or disposition of the property. “Lease” or “rental” does not include:

(a) A transfer of possession or control of tangible personal property under a security agreement or a deferred payment plan that requires the transfer of title upon completion of the required payments;

(b) A transfer of possession or control of tangible personal property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one per cent of the total required payments;

(c) Providing tangible personal property along with an operator for a fixed or indefinite period of time, if the operator is necessary for the property to perform as designed. For purposes of this division, the operator must do more than maintain, inspect, or set-up the tangible personal property.

(2) “Lease” and “rental,” as defined in division (UU) of this section, shall not apply to leases or rentals that exist before June 26, 2003.

(3) “Lease” and “rental” have the same meaning as in division (UU)(1) of this section regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, Title XIII of the Revised Code, or other federal, state, or local laws.

(VV) “Mobile telecommunications service” has the same meaning as in the “Mobile Telecommunications Sourcing Act,” Pub. L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, on and after August 1, 2003,

includes related fees and ancillary services, including universal service fees, detailed billing service, directory assistance, service initiation, voice mail service, and vertical services, such as caller ID and three-way calling.

(WW) “Certified service provider” has the same meaning as in section 5740.01 of the Revised Code.

(XX) “Satellite broadcasting service” means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

(YY) “Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of this chapter and Chapter 5741. of the Revised Code, “tangible personal property” includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

(ZZ) “Direct mail” means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the consumer or at the direction of the consumer when the cost of the items are not billed directly to the recipients. “Direct mail” includes tangible personal property supplied directly or indirectly by the consumer to the direct mail vendor for inclusion in the package containing the printed material. “Direct mail” does not include multiple items of printed material delivered to a single address.

(AAA) “Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) “Computer software” means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(CCC) “Delivered electronically” means delivery of computer software from the seller to the purchaser by means other than tangible storage media.

(DDD) “Prewritten computer software” means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to

be other than prewritten computer software. "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(EEE)(1) "Food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

(2) As used in division (EEE)(1) of this section:

(a) "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

(b) "Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

(c) "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

(d) "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

(FFF) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

(GGG) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue a prescription.

(HHH) "Durable medical equipment" means equipment, including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. "Durable medical equipment" does not include mobility enhancing equipment.

(III) "Mobility enhancing equipment" means equipment, including repair and replacement parts for such equipment, that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. "Mobility enhancing equipment" does not include durable medical equipment.

(JJJ) "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body. As used in this

division, “prosthetic device” does not include corrective eyeglasses, contact lenses, or dental prosthesis.

(KKK)(1) “Fractional aircraft ownership program” means a program in which persons within an affiliated group sell and manage fractional ownership program aircraft, provided that at least one hundred airworthy aircraft are operated in the program and the program meets all of the following criteria:

(a) Management services are provided by at least one program manager within an affiliated group on behalf of the fractional owners.

(b) Each program aircraft is owned or possessed by at least one fractional owner.

(c) Each fractional owner owns or possesses at least a one-sixteenth interest in at least one fixed-wing program aircraft.

(d) A dry-lease aircraft interchange arrangement is in effect among all of the fractional owners.

(e) Multi-year program agreements are in effect regarding the fractional ownership, management services, and dry-lease aircraft interchange arrangement aspects of the program.

(2) As used in division (KKK)(1) of this section:

(a) “Affiliated group” has the same meaning as in division (B)(3)(e) of this section.

(b) “Fractional owner” means a person that owns or possesses at least a one-sixteenth interest in a program aircraft and has entered into the agreements described in division (KKK)(1)(c) of this section.

(c) “Fractional ownership program aircraft” or “program aircraft” means a turbojet aircraft that is owned or possessed by a fractional owner and that has been included in a dry-lease aircraft interchange arrangement and agreement under divisions (KKK)(1)(d) and (e) of this section, or an aircraft a program manager owns or possesses primarily for use in a fractional aircraft ownership program.

(d) “Management services” means administrative and aviation support services furnished under a fractional aircraft ownership program in accordance with a management services agreement under division (KKK)(1)(e) of this section, and offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of safety guidelines; the coordination of the scheduling of the program aircraft and crews; program aircraft maintenance; program aircraft insurance; crew training for crews employed, furnished, or contracted by the program manager or the fractional owner; the satisfaction of record-keeping requirements; and the development and use of an operations manual and a maintenance manual for the fractional aircraft ownership program.

(e) “Program manager” means the person that offers management services to fractional owners pursuant to a management services agreement under division (KKK)(1)(e) of this section.

(LLL) “Electronic publishing” means providing access to one or more of the following primarily for business customers, including the federal government or a state government or a political subdivision thereof, to conduct research: news; business, financial, legal, consumer, or credit materials; editorials, columns, reader commentary, or features; photos or images; archival or research material; legal notices, identity verification, or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other similar information which has been gathered and made available by the provider to the consumer in an electronic format. Providing electronic publishing includes the functions necessary for the acquisition, formatting, editing, storage, and dissemination of data or information that is the subject of a sale.

(MMM) “Medicaid health insuring corporation” means a health insuring corporation that holds a certificate of authority under Chapter 1751. of the Revised Code and is under contract with the department of job and family services pursuant to section 5111.17 of the Revised Code.

(NNN) “Managed care premium” means any premium, capitation, or other payment a medicaid health insuring corporation receives for providing or arranging for the provision of health care services to its members or enrollees residing in this state.

CREDIT(S)

(2009 H 1, eff. 7-17-09; 2008 H 562, eff. 9-23-08; 2007 H 157, eff. 12-21-07; 2006 H 699, eff. 3-29-07; 2006 H 293, eff. 1-1-07; 2005 H 66, eff. 1-1-06; 2005 S 26, eff. 6-2-05; 2003 S 37, eff. 10-21-03; 2003 H 95, eff. 9-26-03; 2002 S 200, eff. 9-6-02; 2002 H 524, eff. 6-28-02; 2002 S 143, eff. 6-21-02; 2001 H 405, eff. 12-13-01; 2001 H 94, eff. 9-5-01; 2000 H 612, eff. 9-29-00; 1998 S 173, eff. 1-1-00; 1997 H 215, eff. 9-29-97; 1996 S 266, eff. 11-20-96; 1995 H 61, eff. 10-25-95; 1994 H 715, eff. 4-22-94; 1994 H 632, eff. 7-22-94; 1993 H 152, eff. 7-1-93; 1993 S 122; 1992 H 904, H 791, S 361; 1991 H 298; 1990 H 365, H 531; 1989 H 111; 1988 S 386, H 689; 1987 S 92, H 171, H

274, H 159; 1986 H 54; 1985 H 335; 1984 S 112, H 794; 1983 H 291; 1982 S 530, § 1, 28; 1981 H 671, § 1, 3, H 552, § 1, 25, H 694, § 1, 205, H 275; 1980 H 1032; 1979 H 904, S 16; 1977 H 1; 1976 H 1005, H 1347; 1975 H 1; 1974 S 244, S 544; 1973 S 161, S 241; 132 v S 350, H 919; 129 v 582, 1164; 128 v 421, 1303; 126 v 157; 125 v 305; 1953 H 1; GC 5546-1)

Current through 2009 File 9 of the 128th GA (2009-2010), apv. by 10/27/09 and filed with the Secretary of State by 10/27/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Westlaw

R.C. § 5739.02

Page 1

C

Baldwin's Ohio Revised Code Annotated Currentness

Title LVII. Taxation

Chapter 5739. Sales Tax (Refs & Annos)

Levy and Collection

→ **5739.02 Levy of tax; purpose; rate; exemptions (later effective date)**

<Note: See also version(s) of this section with earlier effective date(s).>

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A)(1) The tax shall be collected as provided in section 5739.025 of the Revised Code. The rate of the tax shall be five and one-half per cent. The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

(2) In the case of the lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer to carry a load of not more than one ton, watercraft, outboard motor, or aircraft, or of any tangible personal property, other than motor vehicles designed by the manufacturer to carry a load of more than one ton, to be used by the lessee or renter primarily for business purposes, the tax shall be collected by the vendor at the time the lease or rental is consummated and shall be calculated by the vendor on the basis of the total amount to be paid by the lessee or renter under the lease agreement. If the total amount of the consideration for the lease or rental includes amounts that are not calculated at the time the lease or rental is executed, the tax shall be calculated and collected by the vendor at the time such amounts are billed to the lessee or renter. In the case of an open-end lease or rental, the tax shall be calculated by the vendor on the basis of the total amount to be paid during the initial fixed term of the lease or rental, and for each subsequent renewal period as it comes due. As used in this division, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code, and "watercraft" includes an outdrive unit attached to the watercraft.

A lease with a renewal clause and a termination penalty or similar provision that applies if the renewal clause is not exercised is presumed to be a sham transaction. In such a case, the tax shall be calculated and paid on the basis of the entire length of the lease period, including any renewal periods, until the termination penalty or similar provision no longer applies. The taxpayer shall bear the burden, by a preponderance of the evidence, that the transaction or series of transactions is not a sham transaction.

(3) Except as provided in division (A)(2) of this section, in the case of a sale, the price of which consists in whole or in part of the lease or rental of tangible personal property, the tax shall be measured by the installments of that lease or rental.

(4) In the case of a sale of a physical fitness facility service or recreation and sports club service, the price of which consists in whole or in part of a membership for the receipt of the benefit of the service, the tax applicable to the sale shall be measured by the installments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state or any of its political subdivisions, or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions;

(2) Sales of food for human consumption off the premises where sold;

(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

(4) Sales of newspapers and of magazine subscriptions and sales or transfers of magazines distributed as controlled circulation publications;

(5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;

(6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under division (A) of section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;

(7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telegraph company, all terms as defined in section 5727.01 of the Revised Code, and sales of electricity delivered through wires;

(8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;

(9)(a) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, or nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year, except as otherwise provided in division (B)(9)(b) of this section. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization.

(b) The limitation on the number of days on which tax-exempt sales may be made by a church or organization under division (B)(9)(a) of this section does not apply to sales made by student clubs and other groups of students of a primary or secondary school, or a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school.

(c) Divisions (B)(9)(a) and (b) of this section do not apply to sales by a noncommercial educational radio or television broadcasting station.

(10) Sales not within the taxing power of this state under the Constitution of the United States;

(11) Except for transactions that are sales under division (B)(3)(r) of section 5739.01 of the Revised Code, the transportation of persons or property, unless the transportation is by a private investigation and security service;

(12) Sales of tangible personal property or services to churches, to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under section 140.08 of the Revised Code; and sales to organizations described in division (D) of section 5709.12 of the Revised Code.

“Charitable purposes” means the relief of poverty; the improvement of health through the alleviation of illness, disease, or injury; the operation of an organization exclusively for the provision of professional, laundry, printing, and purchasing services to hospitals or charitable institutions; the operation of a home for the aged, as defined in section 5701.13 of the Revised Code; the operation of a radio or television broadcasting station that is licensed by the federal communications commission as a noncommercial educational radio or television station; the operation of a nonprofit animal adoption service or a county humane society; the promotion of education by an institution of learning that maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum; the operation of a parent-teacher association, booster group, or similar organization primarily engaged in the promotion and support of the curricular or extracurricular activities of a primary or secondary school; the operation of a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public

interest and education therein; the production of performances in music, dramatics, and the arts; or the promotion of education by an organization engaged in carrying on research in, or the dissemination of, scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business, or sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of section 5709.12 of the Revised Code.

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building materials and services sold to a construction contractor for incorporation into a building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 of the Revised Code; and building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;

(14) Sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock;

(15) Sales to persons primarily engaged in any of the activities mentioned in division (B)(42)(a) or (g) of this section, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail. "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles or bulk tanks, trailers, or similar devices attached to motor vehicles. "Packaging" means placing in a package. Division (B)(15) of this section does not apply to persons engaged in highway transportation for hire.

(16) Sales of food to persons using supplemental nutrition assistance program benefits to purchase the food. As used in this division, "food" has the same meaning as in 7 U.S.C. 2012 and federal regulations adopted pursuant to the Food and Nutrition Act of 2008 [FN1].

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption directly in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption directly in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for such use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture, except where such property is incorporated into real property;

(18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes, or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities;

(19) Sales of prosthetic devices, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when such devices or equipment are for use by a human being.

(20) Sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services, including trauma care and emergency medical services, for political subdivisions of the state;

(21) Sales of tangible personal property manufactured in this state, if sold by the manufacturer in this state to a retailer for use in the retail business of the retailer outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser;

(22) Sales of services provided by the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities, or by governmental entities of the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities;

(23) Sales of motor vehicles to nonresidents of this state under the circumstances described in division (B) of section 5739.029 of the Revised Code;

(24) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed

directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting, and classifying by size; packages, including material and parts for packages, and machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor vehicles licensed to operate on public highways, used in intraplant or interplant transfers or shipment of eggs in the process of preparation for sale, when the plant or plants within or between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein.

(25)(a) Sales of water to a consumer for residential use, except the sale of bottled water, distilled water, mineral water, carbonated water, or ice;

(b) Sales of water by a nonprofit corporation engaged exclusively in the treatment, distribution, and sale of water to consumers, if such water is delivered to consumers through pipes or tubing.

(26) Fees charged for inspection or reinspection of motor vehicles under section 3704.14 of the Revised Code;

(27) Sales to persons licensed to conduct a food service operation pursuant to section 3717.43 of the Revised Code, of tangible personal property primarily used directly for the following:

(a) To prepare food for human consumption for sale;

(b) To preserve food that has been or will be prepared for human consumption for sale by the food service operator, not including tangible personal property used to display food for selection by the consumer;

(c) To clean tangible personal property used to prepare or serve food for human consumption for sale.

(28) Sales of animals by nonprofit animal adoption services or county humane societies;

(29) Sales of services to a corporation described in division (A) of section 5709.72 of the Revised Code, and sales of tangible personal property that qualifies for exemption from taxation under section 5709.72 of the Revised Code;

(30) Sales and installation of agricultural land tile, as defined in division (B)(5)(a) of section 5739.01 of the Revised Code;

(31) Sales and erection or installation of portable grain bins, as defined in division (B)(5)(b) of section 5739.01 of the Revised Code;

(32) The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire, except for packages and packaging used for the transportation of tangible personal property;

(33) Sales to the state headquarters of any veterans' organization in this state that is either incorporated and issued a charter by the congress of the United States or is recognized by the United States veterans administration, for use by the headquarters;

(34) Sales to a telecommunications service vendor, mobile telecommunications service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium, including, but not limited to, poles, wires, cables, switching equipment, computers, and record storage devices and media, and component parts for the tangible personal property. The exemption provided in this division shall be in lieu of all other exemptions under division (B)(42)(a) of this section to which the vendor may otherwise be entitled, based upon the use of the thing purchased in providing the telecommunications, mobile telecommunications, or satellite broadcasting service.

(35)(a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.

(b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(35)(a) of this section; and of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.

(c) Sales of automatic food vending machines that preserve food with a shelf life of forty-five days or less by refrigeration and dispense it to the consumer.

For purposes of division (B)(35) of this section, "direct marketing" means the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier.

(36) Sales to a person engaged in the business of horticulture or producing livestock of materials to be incorporated into a horticulture structure or livestock structure;

(37) Sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to an individual who is licensed or certified to teach in an elementary or a secondary school in this state for use by that individual in preparation for teaching elementary or secondary school students;

(38) Sales to a professional racing team of any of the following:

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

(c) Items of property that are attached to or incorporated in motor racing vehicles, including engines, chassis, and all other components of the vehicles, and all spare, replacement, and rebuilt parts or components of the vehicles; except not including tires, consumable fluids, paint, and accessories consisting of instrumentation sensors and related items added to the vehicle to collect and transmit data by means of telemetry and other forms of communication.

(39) Sales of used manufactured homes and used mobile homes, as defined in section 5739.0210 of the Revised Code, made on or after January 1, 2000;

(40) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exemptions in division (B)(42)(a) of this section to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

(41) Sales to a person providing services under division (B)(3)(r) of section 5739.01 of the Revised Code of tangible personal property and services used directly and primarily in providing taxable services under that section.

(42) Sales where the purpose of the purchaser is to do any of the following:

(a) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume the thing transferred directly in producing tangible personal property for sale by mining, including, without limitation, the extraction from the earth of all substances that are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, or directly in the rendition of a public utility service, except that the

sales tax levied by this section shall be collected upon all meals, drinks, and food for human consumption sold when transporting persons. Persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

- (b) To hold the thing transferred as security for the performance of an obligation of the vendor;
- (c) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;
- (d) To use or consume the thing directly in commercial fishing;
- (e) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed as controlled circulation publications;
- (f) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;
- (g) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;
- (h) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as described in division (B)(7) of section 5739.01 of the Revised Code, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would not be subject to the tax imposed by this section;
- (i) To use the thing transferred as qualified research and development equipment;
- (j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, "affiliated group" has the same meaning as in division (B)(3)(c) of section 5739.01 of the Revised Code and "direct marketing" has the same meaning as in division (B)(35) of this section.
- (k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty,

maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;

(l) To use or consume the thing transferred in the production of a newspaper for distribution to the public;

(m) To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service;

(n) To use or consume the thing transferred in acquiring, formatting, editing, storing, and disseminating data or information by electronic publishing.

As used in division (B)(42) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of section 5739.01 of the Revised Code.

(43) Sales conducted through a coin operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction.

(44) Sales of replacement and modification parts for engines, airframes, instruments, and interiors in, and paint for, aircraft used primarily in a fractional aircraft ownership program, and sales of services for the repair, modification, and maintenance of such aircraft, and machinery, equipment, and supplies primarily used to provide those services.

(45) Sales of telecommunications service that is used directly and primarily to perform the functions of a call center. As used in this division, "call center" means any physical location where telephone calls are placed or received in high volume for the purpose of making sales, marketing, customer service, technical support, or other specialized business activity, and that employs at least fifty individuals that engage in call center activities on a full-time basis, or sufficient individuals to fill fifty full-time equivalent positions.

(46) Sales by a telecommunications service vendor of 900 service to a subscriber. This division does not apply to information services, as defined in division (FF) of section 5739.01 of the Revised Code.

(47) Sales of value-added non-voice data service. This division does not apply to any similar service that is not otherwise a telecommunications service.

(48)(a) Sales of machinery, equipment, and software to a qualified direct selling entity for use in a warehouse or distribution center primarily for storing, transporting, or otherwise handling inventory that is held for sale to independent salespersons who operate as direct sellers and that is held primarily for distribution outside this state;

(b) As used in division (B)(48)(a) of this section:

(i) "Direct seller" means a person selling consumer products to individuals for personal or household use and not from a fixed retail location, including selling such product at in-home product demonstrations, parties, and other one-on-one selling.

(ii) "Qualified direct selling entity" means an entity selling to direct sellers at the time the entity enters into a tax credit agreement with the tax credit authority pursuant to section 122.17 of the Revised Code, provided that the agreement was entered into on or after January 1, 2007. Neither contingencies relevant to the granting of, nor later developments with respect to, the tax credit shall impair the status of the qualified direct selling entity under division (B)(48) of this section after execution of the tax credit agreement by the tax credit authority.

(c) Division (B)(48) of this section is limited to machinery, equipment, and software first stored, used, or consumed in this state within the period commencing June 24, 2008, and ending on the date that is five years after that date.

(49) Sales of materials, parts, equipment, or engines used in the repair or maintenance of aircraft or avionics systems of such aircraft, and sales of repair, remodeling, replacement, or maintenance services in this state performed on aircraft or on an aircraft's avionics, engine, or component materials or parts. As used in division (B)(49) of this section, "aircraft" means aircraft of more than six thousand pounds maximum certified takeoff weight or used exclusively in general aviation.

(50) Sales of full flight simulators that are used for pilot or flight-crew training, sales of repair or replacement parts or components, and sales of repair or maintenance services for such full flight simulators. "Full flight simulator" means a replica of a specific type, or make, model, and series of aircraft cockpit. It includes the assemblage of equipment and computer programs necessary to represent aircraft operations in ground and flight conditions, a visual system providing an out-of-the-cockpit view, and a system that provides cues at least equivalent to those of a three-degree-of-freedom motion system, and has the full range of capabilities of the systems installed in the device as described in appendices A and B of part 60 of chapter 1 of title 14 of the Code of Federal Regulations.

(C) For the purpose of the proper administration of this chapter, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

(E) The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional sales tax pursuant to section 5739.021 or 5739.026 of the Revised Code and of transit authorities levying an additional sales tax pursuant to section

5739.023 of the Revised Code. Except for the discount authorized under section 5739.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of the tax levied by this section or section 5739.021, 5739.023, or 5739.026 of the Revised Code.

CREDIT(S)

(2009 H 1, eff. 10-16-09; 2008 H 420, eff. 2-1-09; 2008 H 562, eff. 6-24-08; 2007 H 157, eff. 12-21-07; 2007 H 119, eff. 6-30-07; 2005 H 66, eff. 6-30-05; 2003 S 37, eff. 10-21-03; 2003 H 95, eff. 9-26-03; 2002 H 371, eff. 10-11-02; 2002 S 200, eff. 9-6-02; 2002 S 143, eff. 6-21-02; 2001 H 117, eff. 10-8-01; 2001 H 94, eff. 9-5-01; 2000 H 138, eff. 11-3-00; 2000 H 612, eff. 9-29-00; 2000 H 640, eff. 9-14-00; 1999 H 223, eff. 11-3-99; 1999 S 3, eff. 10-5-99; 1999 H 163, eff. 3-31-99; 1998 S 142, eff. 3-30-99; 1998 H 770, eff. 6-17-98; 1998 S 66, eff. 7-22-98; 1997 H 215, eff. 9-29-97; 1997 H 210, eff. 3-31-97; 1996 S 310, eff. 6-20-96; 1995 H 117, eff. 9-29-95; 1995 H 249, eff. 7-17-95; 1994 H 715, eff. 7-22-94; 1994 H 632, eff. 7-22-94; 1994 H 163, eff. 5-10-94; 1993 H 281, eff. 7-2-93; 1993 H 152, H 207, S 18; 1992 S 359, H 904, H 766, S 131; 1991 H 298; 1990 H 365, H 531; 1989 S 156, H 111; 1988 S 386, H 772, H 708; 1987 S 92, S 21, H 171; 1986 H 54, H 500, H 583; 1985 H 335, H 560, H 146; 1984 S 231; 1982 S 530; 1981 H 671, H 694, H 1, H 275; 1980 H 1112, H 703; 1979 H 355, H 1, H 154; 1978 H 8, H 291, H 563, H 635; 1974 S 244, H 1313; 1973 H 3, S 241; 1971 H 475, S 222; 132 v S 474, S 207, S 350, H 519; 131 v H 605, S 203; 130 v H 11, H 1; 129 v 1336, 1301; 128 v 421; 1953 H 1; GC 5546-2)

[FN1] 7 U.S.C.A. § 2011 et seq.

Current through 2009 File 9 of the 128th GA (2009-2010), apv. by 10/27/09 and filed with the Secretary of State by 10/27/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

Westlaw

R.C. § 5739.08

Page 1

C

Baldwin's Ohio Revised Code Annotated Currentness

Title LVII. Taxation

▣ Chapter 5739. Sales Tax (Refs & Annos)

▣ Levy and Collection

→ **5739.08 Hotel lodgings; additional excise taxes permitted**

The levy of an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests pursuant to section 5739.02 and division (B) of section 5739.01 of the Revised Code does not prevent any of the following:

(A) A municipal corporation or township from levying an excise tax for any lawful purpose not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by section 5739.02 of the Revised Code. If a municipal corporation or township repeals a tax imposed under division (A) of this section, and a county in which the municipal corporation or township has territory has a tax imposed under division (C) of section 5739.09 of the Revised Code in effect, the municipal corporation or township may not reimpose its tax as long as that county tax remains in effect. A municipal corporation or township in which a tax is levied under division (B)(2) of section 351.021 of the Revised Code may not increase the rate of its tax levied under division (A) of this section to any rate that would cause the total taxes levied under both of those divisions to exceed three per cent on any lodging transaction within the municipal corporation or township.

(B) A municipal corporation or a township from levying an additional excise tax not to exceed three per cent on such transactions pursuant to division (B) of section 5739.09 of the Revised Code. Such tax is in addition to any tax imposed under division (A) of this section.

(C) A county from levying an excise tax pursuant to division (A) of section 5739.09 of the Revised Code;

(D) A county from levying an excise tax not to exceed three per cent of such transactions pursuant to division (C) of section 5739.09 of the Revised Code. Such a tax is in addition to any tax imposed under division (C) of this section.

(E) A convention facilities authority, as defined in division (A) of section 351.01 of the Revised Code, from levying the excise taxes provided for in divisions (B) and (C) of section 351.021 of the Revised Code;

(F) A county from levying an excise tax not to exceed one and one-half per cent of such transactions pursuant to division (D) of section 5739.09 of the Revised Code. Such tax is in addition to any tax imposed under division (C) or (D) of this section.

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.

Appendix 062

R.C. § 5739.08

Page 2

(G) A county from levying an excise tax not to exceed one and one-half per cent of such transactions pursuant to division (E) of section 5739.09 of the Revised Code. Such a tax is in addition to any tax imposed under division (C), (D), or (F) of this section.

CREDIT(S)

(2005 H 66, eff. 6-30-05; 2002 S 143, eff. 6-21-02)

Current through 2009 File 9 of the 128th GA (2009-2010), apv. by 10/27/09 and filed with the Secretary of State by 10/27/09.

Copr. (c) 2009 Thomson Reuters

END OF DOCUMENT

© 2009 Thomson Reuters. No Claim to Orig. US Gov. Works.